

Supreme Court of the United States

OCTOBER TERM, 1969

No. 270

ROBERT M. BRADY,

Petitioner,

vs.

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE TENTH CIRCUIT

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CHRONOLOGICAL LIST OF PLEADINGS,
HEARINGS AND ORDERS

Date	Pleading
1. January 28, 1959	Transcript of arraignment and plea of not guilty
2. April 30, 1959	Transcript of change of plea to guilty
3. May 8, 1959	Transcript of sentencing
4. September 20, 1967	Motion to vacate sentence and collaterally attack judgment, pursuant to Title 28, Sec. 2255, U.S.C.A.
5. September 20, 1967	Motion for leave to file and proceed in forma pauperis, without prepayment of costs
6. September 20, 1967	Affidavit in support of motion for leave to proceed without prepayment of fees, in forma pauperis
7. September 20, 1967	Affidavit of service
8. September 20, 1967	Order authorizing movant to proceed in forma pauperis
9. October 10, 1967	Response
10. December 14, 1967	Pre-trial conference before Hon. H. Vearle Payne, United States District Judge
11. January 19, 1968	Transcript of proceedings of January 28, 1959
12. March 13, 1968	Order for writ of habeas corpus ad testificandum for Robert M. Brady
13. March 13, 1968	Order for writ of habeas corpus ad testificandum for Alfonso Pedro Tafoya
14. March 19, 1968	Motion for production of documents

Date	Pleading
15. March 20, 1968	Hearing on motion pursuant to 28 U.S.C., Sec. 2255, before Hon. H. Vearle Payne, United States District Judge, sitting without a jury
16. March 25, 1968	Respondent's proposed findings of fact and conclusions of law
17. March 25, 1968	Proposed findings of fact and conclusions of law of Petitioner, Robert M. Brady
18. March 27, 1968	Memorandum decision and order
19. March 27, 1968	Order
20. April 11, 1968	Notice of appeal
21. April 24, 1968	Order denying motion for rehearing
22. April 29, 1968	Motion to proceed in forma pauperis
23. April 29, 1968	Affidavit to proceed in forma pauperis
24. April 29, 1968	Order authorizing movant to proceed in forma pauperis
25. October 2, 1968	Oral argument before the United States Court of Appeals for the Tenth Circuit
26. December 17, 1968	Opinion and decision of the United States Court of Appeals for the Tenth Circuit
27. January 23, 1969	Mandate of the United States Court of Appeals for the Tenth Circuit to the United States District Court for the District of New Mexico
28. March 11, 1969	Application for extension of time to file petition for writ of certiorari
29. March 13, 1969	Order extending time to file petition for writ of certiorari

Date	Pleading
30. April 16, 1969	Docketing of petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit, and motion for leave to proceed in forma pauperis, in the Supreme Court of the United States
31. May 19, 1969	Response to petition for writ of certiorari
32. June 23, 1969	Petition for writ of certiorari granted

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civil No.: 7269

Cr. No: 19847
USDC, New Mexico

ROBERT M. BRADY, APPLICANT

vs.

UNITED STATES OF AMERICA, WARDEN J. T. WILLINGHAM, UNITED STATES PENITENTIARY, LEAVENWORTH, KANSAS, RESPONDENTS

MOTION TO VACATE SENTENCE AND COLLATERALLY ATTACK JUDGMENT PURSUANT TO TITLE 28 SECTION 2255
U. S. CODE AS ANNOTATED—Filed September 20, 1967

State of Kansas)
County of Leavenworth) ss
United States Penitentiary)

Applicant, Robert M. Brady brings before the court a Motion as above entitled, predicated upon the basis of the Statute, 28 U.S.C. 2255, and claims of a judgment obtained in violation of his constitutional rights, provided in the Due Process clauses of the United States Constitution.

The sentence and judgment as attacked herein was entered in the United States District Court for the District of New Mexico (Hatch, J.) in Criminal Cause 19847, May 8, 1959, whereby judgment entered upon a plea of Guilty, and sentence adjudged to place applicant in the care of the Attorney General of the United States for a period of Fifty (50) years. The sentence in said cause has thereafter been reduced to 30 years in the custody of the Attorney General of the United States, pursuant to an order as entered by Executive Clemency

in 1965. Upon this basis the venue is proper under 28 USC for the determination of this matter.

Applicant alleges and says that judgment and sentence in the criminal cause were obtained in violation of his due process rights as a citizen of the United States, in areas to wit:

1. The plea of Guilty as entered in Criminal Cause No: 19847, by this applicant was induced, and not entered freely and Voluntarily, upon these inducive factors:

(a) The Statute, 18 U.S.C. 1201, upon which the charge is based, required applicant to plead Guilty, and coerced said plea because it impeded his free exercise of demanding a jury trial, as is guaranteed by Amendment 6 of the United States Constitution.

(b) That counsel as retained by applicant had in their purview of the evidence in the possession of the United States, unsurped the power of a jury, and did then and therebeing act as a jury, and did adjudge applicant guilty, and from pressures exerted by them upon applicant, they induced his plea of guilty.

(c) That certain representations were made to applicant by Counsel of a Co-Defendant and also a co-defendant that in return, for the tendering of a Guilty plea, certain efforts as to reduction of sentence and executive clemency would be undertaken in his behalf by the then Senator from New Mexico, Honorable Senator Chavez, and the then former Honorable Judge Chavez, of the United States District Court for the District of Puerto Rico, both of whom were blood relations of Co-Defendant Alfonso P. Tafoya.

2. That the trial court failed to fully comply with the requirements of Rule 11, Federal Rules of Criminal procedure, before accepting the guilty plea as

tendered in this cause of action, thereby rendering a Due Process violation ~~of~~ this applicants rights.

Therefore, upon these basis of unconstitutional conduct in the securement of the judgment and sentence in the Criminal Cause of action, this applicant asks that the court enter its order—granting the relief as sought, and further order his release from a current unconstitutional restraint.

/s/ Robert M. Brady
ROBERT M. BRADY
Applicant
U.S. Penitentiary
P.O. Box # 1000
Leavenworth, Kansas

I swear and affirm that the foregoing is true and correct to the best of my knowledge and belief

/s/ Robert M. Brady
ROBERT M. BRADY
Affiant

Signed and Sworn to before me this 13 day of September 1967 A.D.

/s/ Perry N. MacPhee
Classification & Parole Officer
U.S. Penitentiary
Leavenworth, Kansas

“Authorized by the Act of July 7, 1955 to administer oaths (18 U.S.C. 4004).”

* * * *

MEMORANDUM IN SUPPORT OF MOTION TO VACATE SENTENCE AND COLLATERALLY ATTACK JUDGMENT PURSUANT TO TITLE 28 SECTION 2255, U.S.C.A.—Filed September 20, 1967

In support of the Motion this Applicant saith to this court:

1. Venue is proper under the Statute, 28 U.S.C. 2255, as it was this court which imposed the sentence and judgment which is attacked by the Motion. In light of *Maez v. United States*, (C.A.N.M.) (1966) 367 F. 2d 139 this court is empowered to dispose of this cause upon its merits, as the proptiortory venue is adequate.
2. Applicant has asserted two substantial allegations, upon which he claims relief. These allegations are concerned with the guilty plea, and a failure of the trial court to comply with a substantial rule of law before accepting the plea.

It is appearing that the controverted basis of the allegations in the Motion, appear to fall under the teachings of *Romero v. United States*, 327 F. 2d 711; *Olive v. United States*, 327 F. 2d 646; and *Nichols v. United States*, 310 F. 2d 374, will require an evidentiary hearing with the production of the Applicant and also his co-defendant, so that appropriate testimony will be evinced in support.

3. Applicant has laid claim that his right to assert a trial by jury was impaired by the statute upon which he was charged being unconstitutional upon its face, because of the method in which punishment can be limited. The claim has been further enhanced that the statute upon its face coerces a guilty plea, which violates fundamental precepts of Due Process of Law.

According to exhibit number one, we see that applicant in Criminal No. 19847 United States Dis-

trict Court For the District of New Mexico, was indicted and charged with a violation of 18 U.S.C. 1201. It is this statute upon which the claim for relief is laid in part.

18 U.S.C. 1201, plainly prescribes a possible penalty of death, if the kidnapped person is not liberated unharmed. While on another basis as can be attributed to the wording of the statute upon its face, "*if the verdict of the Jury shall so recommend*" that if a plea of Guilty is entered the death penalty is proscribed because there is no jury, when a guilty plea is accepted, and therefore there can be no recommendation. See *Waley v. United States*, 233 F. 2d 804, 806.

Therefore the wording of the Statute upon its face provides two standards of possible punishment, death for one who pleads Not Guilty, and a term for those who plead Guilty.

This double standard coerces a guilty plea and imposes a grave price to one who asserts his constitutional right to a jury trial of his peers.

The right to trial is assertedly an adherent part of due process, and is not a privilege but is an assertable right. This principal has been held consistently that a right may be asserted, and the assertion of a right may not be made costly, for the exercise of the same. See *Griffin v. California*, 380 U.S. 609, 615 and *United States v. Wiley* 278 F. 2d 500.

The effect of the risk of assertion of the right to a trial by jury is death, and in the indictment of this cause of action shows rather conclusively that the government intended to introduce evidence in the area of the liberation of the kidnapped person unharmed. The language of the indictment is clearly revealed by the saying therein "*was not liberated unharmed*."

These factors truly make any plea of guilty, which was tendered and accepted, truly not a voluntary

plea, but one which was obtained in derogation of due process, by the putting of fear into applicant which coerces the plea, because he dare not assert his right to trial by jury.

Applicant makes an adequate observation that there was perhaps a recourse under Rule 23(a) Federal Rules of Criminal Procedure, wherein he could perhaps have asked for a bench trial in front of the trial court, however, this may be obtained only with the approval of the Government, c.f. *Singer v. United States* 380 U.S. 2U, 34-38, and although it would have been a discretionary matter the Trial Judge, if a bench trial had been had, would have been empowered to submit the issue of punishment to a jury in light of the teachings of *Seadlund v. United States* 97 F 2d 742, 748.

It is fully apparent that because this applicant tendered a guilty plea he gained immunity from Capital Punishment. In light of the teachings of *Jackson v. United States*, 262 F. Supp 716, which this applicant generally adopts as the basis of the effect of the statute upon his plea.

- B. Applicant has advanced a rather radical claim in regards to his assistance of counsel, and the effect of them, the counsel upon his plea.

Applicants counsels, A. Gilberto Espinosa, and Robert H. LaFollett, Esqs., were in a position to which it is advanced, they unsurped the power of a jury, acted as a jury, and found this applicant guilty.

What are the novel consequences of the allegation as advanced?

Perhaps the most logical basis centers upon the question of competency of these two attorneys in the handling of this cause of action.

It is conceded that counsel was of this applicants own choosing, as discussed in *Taylor v. United*

States 238 F. 2d 409, but it is equally advanced that neither attorney had any experience in a Federal Criminal Cause of action of a Capital Nature, which will require a trial de novo of this issue in this court. See *Gibbs v. Blackwell*, 354 F. 2d 469.

Applicant had advanced to counsel on several occasions that he was not in fact guilty of the charge of the indictment.

Counsel after a perview of the evidence of the Government, and after failing to make any independent determination of the facts themselves, as suggested by the applicant, found the applicant guilty of the charge, and there every exertable effort from then on was devoted to the inducing of a Guilty Plea from the applicant.

It is appearing that counsel not only found their client guilty, after a preview of government evidence, but that they failed to give adequate information to this applicant of his rights. Due Process requires more than a perfunctory information as to applicants rights. See *Smith v. United States*, 238 F. 2d 925, revr. 137 F. Supp. 222, Mfd 240 F 2d 347.

It is advanced that perhaps the and the belief of this applicant, preview of the Governments evidence revealed a statement in chief as made by his co-defendant in this cause, and also a presumption that co-defendant was going to plead guilty to the charge.

Counsel had a sworn duty to fully protect his client, and to fully explain to him the consequences of the statement, exculpory in nature, and that under applicable law it would not be used as evidence against him in a trial, because in a joint trial it would have been impossible for him to cross-examine this rather incriminating statement. See *U.S. v. Echeles* 353 F. 2d 892, and also *Poe v. United States*, 233 F. Supp. 173, AFF'd 352 F. 2d 639.

Instead counsel used the basis and threat of co-defendants statement to further enhance their finding of Guilty of the applicant, and to induce a guilty plea from applicant.

- C. That certain pressures were brought to bear upon this applicant by his co-defendant Alfonso Pedro Tafoya, and this co-defendants counsel have been advanced in chief. Applicant has advanced this claim so that he can reveal the psychological pressures which were brought to bear by these parties and the part they payed in the inducement of the plea.

Applicants co-defendant a member of a rather politically influential family in the State of New Mexico, advanced certain claims to the applicant in regards to favorable clemency, and reductions in sentence if a guilty plea was rendered, because of the intervention of the then Senator from the State of New Mexico, an Uncle of co-defendant Tafoya and another Uncle who had been United States District Judge for the District of Puerto, Rico. These claims further buttressed by immundos made by applicants own counsel and also Tafoya's counsel, can readily be seen to have a grave psychological effect upon a then 24 year old defendant, and the inducement which it would make to enter a guilty plea.

- D. Applicant has advanced complaints that the guilty plea was induced by anyone of three factors. A finding that any one of the factors was an indication of inducement of the plea requires that the relief as sought be granted.

However, since inducements are advanced, they will, in the teachings implicated in *Putnam v. United States* 337 F. 2d 313, and *United States v. Cannon* 310 F. 2d 841, require an evidentiary hearing and trial de novo, because of a controversy of law and facts contemplated.

1. Implications of the claim advanced that Rule 11, Federal Rules of Criminal Procedure was not fully complied with before the acceptance of the Guilty Plea can be adduced from the record proper, and its inspection tendered with the accepted rules of law in regard to the same.

Rule 11 requires an adequate determination be made before acceptance of the plea, and it is advanced that in light of the dicta as established by *Heidien v. United States*, 353 F. 2d 53, and *United States v. Mack* 249 F 2d. 421, that a full and proper determination was not made.

—Conclusion—

Wherefore it is appearing that the relief as sought is proper. Applicant therefore asks that the court to enter an order requiring the respondents to respond to the rule, for the production of Applicant before the court for an evidentiary hearing, and any other equitable relief as indicated.

/s/ Robert M. Brady
ROBERT M. BRADY
Applicant
U.S. Penitentiary
P.O. Box 1000
Leavenworth, Kansas

APPENDIX B

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF NEW MEXICO

Criminal No. 19847

Violation: 18 USC 1201 Kidnapping
Filed at Albuquerque, Jan. 27, 1959,
Wm. D. Bryars, Clerk.

Filed at Albuquerque, Sep. 20, 1967,
E. E. Greeson, Clerk.

UNITED STATES OF AMERICA, PLAINTIFF

vs.

ROBERT M. BRADY and ALFONSO PEDRO TAFOYA,
DEFENDANTS

INDICTMENT

The Grand Jury charges:

That the defendants described below participated in the same acts and transactions in the commission of the offenses described below:

On or about the 18th day of January, 1959, the defendants, ROBERT M. BRADY and ALFONSO PEDRO TAFOYA, did unlawfully seize, kidnap, hold and abduct said Barbara Ann Steger and said defendants did knowingly hold, transport, and cause to be transported in interstate commerce the said Barbara Ann Steger from Albuquerque, in the State and District of New Mexico to El Paso, Texas, and that the said Barbara Ann Steger was not liberated unharmed.

In violation of 18 USC 1201.

A TRUE BILL:

/s/ S. L. Balling
Foreman of the Grand Jury

/s/ James A. Borland
JAMES A. BORLAND
United States Attorney

APPENDIX C

DISTRICT COURT OF THE UNITED STATES
DISTRICT OF NEW MEXICO
..... DIVISION

Commissioner's Docket No. 13

Case No. 262

Received, U. S. Marshal's Office, Jan. 26 1959,
Albuquerque, New MexicoFiled at Albuquerque, Jan. 27, 1959,
Wm. D. Bryars, Clerk.

UNITED STATES OF AMERICA

v

ALFONSO PEDRO TAFOYA, ROBERT BRADY

TEMPORARY COMMITMENT

of

To the United States Marshal of the District of New Mexico:

You are hereby commanded to take the custody of the above named defendant and to commit him with a certified copy of this commitment to the custodian of a place of confinement within this district approved by the Attorney General of United States where the defendant shall be received and safely kept until discharged in due course of law. The above named defendant has been arrested but not yet fully examined by me upon the complaint of Cary Carlton SA FBI, charging that on or about 18 January, 1959 at Albuquerque in the District of New Mexico the defendant did unlawfully seize and kidnap Barbara Ann Steger, and transport her to El Paso, Texas, and during the course of said transportation did rape her several times in violation of U.S.C. Title 18

Section 262; the offense being a capital offense no bail is permitted in accordance with all my orders and directions relating thereto, and he has failed to do so.

Dated: 21 January 1959

/s/ [Illegible]
United States Commissioner

RETURN

Received this commitment and designated prisoner on Jan. 21, 1959, and on Jan. 21, 1959, committed him to Albuquerque, New Mexico City Jail, and left with the custodian at the same time a certified copy of this commitment.

Dated: 1/26, 1959.

/s/ Geo. W. Beach
United States Marshal
District of New Mexico

By
Deputy

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

No. 19,847 Criminal

Filed at Albuquerque, May 8, 1959,
Wm. D. Bryars, Clerk.

UNITED STATES OF AMERICA

v.

ROBERT M. BBADY

On this 8th day of May, 1959 came the attorney for the government and the defendant appeared in person

and¹ by his attorneys, A. Gilberto Espinosa, Esquire, and Robert H. LaFollette, Esquire.

IT IS ADJUDGED that the defendant has been convicted upon his plea of² Guilty of the offense of interstate transportation of a kidnaped person, who was not liberated unharmed, in violations of Sec. 1201, Title 18, United States Code, as charged³ in the Indictment, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of⁴ FIFTY (50) YEARS.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Carl A. Hatch
United States District Judge

The Court recommends commitment to:⁶

Clerk

¹ Insert "by counsel" or "without counsel; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel."

² Insert (1) "guilty," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be. ³ Insert "in count(s) number

if required. ⁴ Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding or unexpired sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law. ⁵ Enter any order with respect to suspension and probation. ⁶ For use of Court wishing to recommend a particular institution.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civil No. 7269

ROBERT M. BRADY, APPLICANT

—v8—

UNITED STATES OF AMERICA, WARDEN J. T. WILLINGHAM, UNITED STATES PENITENTIARY, LEAVENWORTH, KANSAS, RESPONDENTS

MOTION FOR LEAVE TO FILE AND PROCEED IN FORMA PAUPERIS, WITHOUT PREPAYMENT OF COSTS—Filed September 20, 1967

State of Kansas)
County of Leavenworth) ss
United States Penitentiary)

Robert M. Brady, applicant herein and in a Motion as attached hereto an annexed as a part hereof entitled 1.6. "Motion to Vacate Sentence and Collaterally Attack Judgment pursuant to 28 U.S.C. 2255," asks for adequate relief as is allowed by 28 U.S.C. 1915 (a) (d).

Applicant asks that the motion as attached hereto be filed and allowed to prosecute the same, without the prepayment of costs, in Forma Pauperis.

Applicant is of the belief that there is legal merit to the said action and that he is entitled to legal redress. The action is taken in good faith and presents substantial matters of law.

Wherefore upon the basis of the Statute, the affidavit in support is required thereby, which is attached as exhibit number one herewith, this applicant respectfully asks that the court enter its order for Leave to Proceed

in Forma Pauperis and direct that filing fees and costs of prosecution be charged to the United States.

/s/ Robert M. Brady

ROBERT M. BRADY, Applicant
United States Penitentiary
P. O. Box 1000
Leavenworth, Kansas

I, Robert M. Brady affirm that the foregoing is true and correct to the best of my knowledge and belief

/s/ Robert M. Brady
Affiant

Signed and Sworn to before
me this 13 day of September
1967 A. D.

/s/ Perry N. MacPhee
Classification & Parole Officer
U.S. Penitentiary
Leavenworth, Kansas

"Authorized by the Act of July 7, 1955
to administer oaths (18 U.S.C. 4004)."

(Authorized 18 USC 4004 to Act as a Notary Public)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civil No. 7269

[File Endorsement (Omitted in Printing)]

ROBERT M. BRADY, APPLICANT

—v8—

UNITED STATES OF AMERICA, WARDEN J. T. WILLINGHAM, UNITED STATES PENITENTIARY, LEAVENWORTH, KANSAS, RESPONDENTS

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED WITHOUT PREPAYMENT OF FEES, IN FORMA PAUPERIS
—Filed September 20, 1967

State of Kansas)
County of Leavenworth) ss
United States Penitentiary)

I, Robert M. Brady, applicant in a Motion For Leave to Proceed, and a further Motion to Vacate sentence and collaterally Attack Judgment Pursuant to 28 USC 2255, after first being placed upon my oath do declare to this court in Support of the relief sought:

1. I am an incarcerated prisoner at the United States Penitentiary at Leavenworth, Kansas, where custody is held by the Respondent Warden pursuant to Judgment entered by the United States District Court for the District of New Mexico, May 8, 1959.
2. That I am a poor person without funds in excess of \$100.00, and that I have no other available means of collateral, bank accounts, checking accounts, or personal property, with which to prepay the costs of filing and prosecution in this matter.

3. That I am indeed a Pauper and entitled to the Relief as outlined in 28 USC 1915 (a) (d).

/s/ Robert M. Brady
ROBERT M. BRADY, Applicant

I, Robert M. Brady affirm that the foregoing is true and correct to the best of my knowledge.

/s/ Robert M. Brady
Affiant

Signed and Sworn to before me this 13 day of September 1967 A.D. at the Place as first written.

/s/ Perry N. MacPhee
Classification & Parole Officer
U.S. Penitentiary
Leavenworth, Kansas

"Authorized by the Act of July 7, 1955 to administer oaths (18 U.S.C. 4004)."

(Authorized 18 USC 4004 to Act as a Notary Public)

[Affidavit of Service (Omitted in Printing)]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 7269

ROBERT M. BRADY, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

ORDER—September 20, 1967

Petitioner having forwarded to the court a motion to vacate sentence and attack judgment in Criminal Cause No. 19,847, United States of America vs. Robert M. Brady, accompanied by an affidavit in forma pauperis, and the court having considered the same,

IT IS ORDERED the petition may be filed without prepayment of fees or costs or the giving of security therefor;

IT IS FURTHER ORDERED that John R. Cooney, P. O. Box 466, Albuquerque, New Mexico, is hereby appointed to represent the petitioner and return of respondent shall be served upon him.

DONE at Albuquerque, New Mexico this 20th day of September, 1967.

/s/ H. Vearle Payne
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

[File Endorsement (Omitted in Printing)]

No. 7269

ROBERT M. BRADY, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

RESPONSE—Filed October 10, 1967

Comes now respondent United States of America and in response to Petitioner's motion, states:

1. That the plea of guilty was freely and voluntarily made by the Petitioner.
2. The record shows that the trial Court complied with the requirements of Rule 11 of the Federal Rules of Criminal Procedures before accepting the guilty plea in Criminal Cause No. 19,847, *United States vs. Robert M. Brady*, United States District Court, for the District of New Mexico.

WHEREFORE, Respondent prays that Petitioner's motion to vacate the judgment and sentence in Criminal No. 19,847 be denied, as the records show that he is entitled to no relief.

JOHN QUINN
United States Attorney

/s/ Scott McCarty
SCOTT McCARTY
Assistant U. S. Attorney

This will certify that a true copy of the foregoing pleading was mailed to opposing counsel this 10 day of October, 1967.

/s/ Scott McCarty
SCOTT McCARTY
Assistant U. S. Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 19,847 Criminal

Filed at Albuquerque, Jan. 19, 1968,
E. E. Greeson, Clerk

UNITED STATES OF AMERICA, PLAINTIFF

vs.

ROBERT M. BRADY, ALFONSO PEDRO TAFOYA, DEFENDANTS

BE IT REMEMBERED, that on the 28th day of January, 1959, the above named defendants appeared in person in open court before the Honorable Carl A. Hatch, United States District Judge, at Albuquerque, New Mexico, the United States appearing by and through Assistant United States Attorney Joseph C. Ryan, and proceedings were had as follows:

TRANSCRIPT OF PROCEEDINGS

THE COURT: The offense charged in this indictment is that of kidnaping and also provides that the person alleged to have been kidnaped was not returned unharmed, which would make it possible, under the provisions of the law, if the jury so determined and you were found guilty, that the death sentence could be imposed.

Under those circumstances, I think you should have an [fol. 2] attorney to represent you. Do you have an attorney?

DEFENDANT: We do.

THE COURT: Where is he?

DEFENDANT: I don't know. Robert La Follette is our attorney.

THE COURT: Where is he?

DEFENDANT: I don't know, sir.

MR. RYAN: I don't know whether he was advised that they were coming up this morning.

THE COURT: Did you get in touch with him and tell him you were going to be here this morning?

DEFENDANT: We didn't know about it until just this morning.

THE COURT: Mr. Marshal, will you get in touch with Mr. LaFollette and tell him to get over here.

(A short time later on the 28th day of January, 1959, the defendants again appeared before the Honorable Carl A. Hatch, United States District Judge, at Albuquerque, New Mexico, accompanied by their counsel, Mr. Robert Hoath LaFollette, Attorney at Law, Sunshine Building, Albuquerque, New Mexico, and Mr. Gilberto Espinosa, Attorney at Law, Sunshine Building, Albuquerque, New Mexico, the United States appearing by and through Assistant United States Attorney Joseph C. Ryan, and further proceedings were had as follows:

MR. LA FOLLETTE: Mr. Espinosa is also of counsel.

[fol. 3] THE COURT: Mr. LaFollette, you do represent these men, do you?

MR. LaFOLLETTE: Yes, Your Honor.

THE COURT: You should have notified the clerk and made your appearance so you could have been here on time this morning.

MR. LaFOLLETTE: I didn't realize you were bringing up arraignment this morning, Your Honor, and I had no notice that they were coming up.

THE COURT: I know, but we didn't know you were the attorney, either.

MR. LaFOLLETTE: That's what I said; I had not formally entered an appearance.

THE COURT: You should let the clerk know you were going to represent them. Then you would have been notified.

MR. LaFOLLETTE: I'm sorry.

THE COURT: Proceed with arraignment.

(The Indictment was read by the Assistant United States Attorney.)

THE COURT: How do they plead, guilty or not guilty?

MR. LaFOLLETTE: We enter a plea of not guilty on behalf of each of the defendants.

THE COURT: Now, you appear with Mr. LaFollette?

MR. ESPINOSA: If Your Honor please, I have been associated with Mr. LaFollette only recently.

[fol. 4] THE COURT: All right. I will have to enter a plea of not guilty, and I will give the trial date later. You will be notified shortly.

That is all.

[Reporter's Certificate (Omitted in Printing)]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 19,847 Criminal

UNITED STATES OF AMERICA

—vs—

ROBERT M. BRADY AND ALFONSO PEDRO TAFOYA

APPEARANCES:

JOSEPH C. RYAN, Assistant U. S. Attorney, For the
Government.GILBERT ESPINOSA, Esquire, ROBERT H. LAFOLLETTE,
Esquire, For Defendant Brady.

DAVID CHAVEZ, For Defendant Tafoya.

BEFORE:

HONORABLE CARL A. HATCH, Judge.

TRANSCRIPT OF PROCEEDINGS, April 30, 1959—
of change of plea hearing

* * * *

[fol. 2] MR. RYAN: May it please the Court, the
first matter is a possible change of plea, I understand, in
the case of the United States of America versus Robert
M. Brady and Alfonso Pedro Tafoya.THE COURT: Let the defendants and their attor-
neys come forward.You heard the statement of the District Attorney that
this case was being called this morning on the possibility
that the defendants desire to withdraw a plea of not
guilty heretofore entered and change that plea. Is that
correct, gentlemen?MR. CHAVEZ: May the record disclose, which I
think it does, that I appear for the defendant Alfonso
Pedro Tafoya only.THE COURT: You gentlemen appear for the other
defendant?

MR. LAFOLLETTE: Yes, your Honor.

MR. ESPINOSA: Yes, your Honor.

MR. CHAVEZ: As far as Alfonso Pedro Tafoya is concerned, your Honor, I have gone over the matter with him fully. He knows the contents of the indictment and I just went over it with him a few minutes ago and he understands and desires to change his plea of not guilty heretofore entered and now enter a plea of guilty.

MR. ESPINOSA: With respect to Mr. Brady, we can repeat what Mr. Chavez said. I believe I know—I have asked him—that he fully understands the situation and he is entering this plea with his full knowledge and consent. That is correct, Mr. Brady?

DEFENDANT BRADY: That's right.

[fol. 3] THE COURT: Before I enter the formal plea of guilty for these defendants, I want to make to them a certain explanation, which I am sure your attorneys have fully advised you of, but which I want to be certain that each defendant understands. In a case of this kind, the indictment charges what could be a capital offense—that is, that the death sentence could be imposed. That sentence can only be imposed, however, where a jury recommends the imposition of the death penalty. On a plea of guilty, such as your attorneys have announced that you desire to enter, the Court alone cannot impose the death penalty. I could impose a sentence anywhere up to life imprisonment. Do you understand that?

DEFENDANT BRADY: Yes, sir.

DEFENDANT TAFOYA: Yes, sir.

THE COURT: Do you understand that no promise has been made to you at all concerning the length of imprisonment that might be imposed by the Court?

DEFENDANT BRADY: Yes, sir.

DEFENDANT TAFOYA: Yes, sir.

THE COURT: Both of you understand that?

DEFENDANT BRADY: Yes, sir.

DEFENDANT TAFOYA: Yes, sir.

THE COURT: And no promises have been made to you by anybody?

DEFENDANT BRADY: No, sir.

DEFENDANT TAFOYA: No, sir, they haven't.

THE COURT: There is some authority, respectable authority, to the effect that on a plea of this kind the

Court might possibly empanel a jury and submit the [fol. 4] question of whether the death penalty should be imposed. That is hardly a practical matter, as I view it now, for this reason: In order for a jury to pass intelligently, if such power exists, I would think a jury would have to be advised and have evidence as to all the facts in the case, not just pass on the plea of guilty entered, because jurors are conscientious. They wouldn't want to say the death penalty should be imposed or should not be imposed unless a full trial was had before a jury. I am not inclined at all to follow that procedure. In what appears to be the present uncertain state of the law, I am inclined to think—and to relieve your minds of any suspense—that the penalty should not be imposed in your case, nor should a jury be empaneled, but you will be sentenced to a sentence that could be for life imprisonment. I want to be sure that you understand that.

Now, with that explanation, do each of you—Brady first—are you guilty or not guilty?

DEFENDANT BRADY: I am guilty, your Honor.

THE COURT: Tafoya, are you guilty or not guilty?

DEFENDANT TAFOYA: I am guilty, your Honor.

THE COURT: Enter a plea of guilty for each defendant.

You will both be back here one week from today at 10:30 in the morning for sentence.

Mr. District Attorney, upon the request of defendant's counsel, not for the purpose of establishing a defense, but to aid the Court in better understanding, the defendant Brady has requested a psychiatric examination by Dr. Brown be made. Will you have that done before next Friday and have a report for me at that time?

MR. RYAN: Yes, your Honor.

[fol. 5] THE COURT: That is all. The prisoners will be remanded to the custody of the marshal until next Friday morning at 10:30.

MR. LAFOLLETTTE: Will a copy of that report be available to counsel?

THE COURT: It will be.

I said a week from today. I forgot this was Thursday. Be back Friday morning of next week at 10:30.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 19,847 Criminal

UNITED STATES OF AMERICA

—vs—

ROBERT M. BRADY and ALFONSO PEDRO TAFOYA

APPEARANCES:

JOSEPH C. RYAN, Assistant U. S. Attorney, For the
Government

GILBERTO ESPINOSA, ESQUIRE, ROBERT LAFOLLETTE,
ESQUIRE, For Defendant Brady

DAVID CHAVES, ESQUIRE, For Defendant Tafoya

BEFORE:

HONORABLE CARL A. HATCH, Judge.

TRANSCRIPT OF PROCEEDINGS

May 8, 1959—of sentencing

* * * *

[fol. 2] MR. RYAN: This is the matter of defendants
Brady and Tafoya for sentence.

THE COURT: I want to direct my remarks first to
the defendant Brady. Having read the presentence re-
port and the statement you made to the probation officer,
I want to be certain that you know what you are doing
and you did know when you entered a plea of guilty the
other day. Do you want to let that plea of guilty stand,
or do you want to withdraw it and plead not guilty?

DEFENDANT BRADY: I want to let that plea
stand, sir.

THE COURT: You understand that in doing that you
are admitting and confessing the truth of the charge
contained in the indictment and that you enter a plea
of guilty voluntarily, without persuasion, coercion of any
kind? Is that right?

DEFENDANT BRADY: Yes, your Honor.

THE COURT: And you do do that?

DEFENDANT BRADY: Yes, I do.

THE COURT: You plead guilty to the charge?

DEFENDANT BRADY: Yes, I do.

THE COURT: To each of you: Upon your pleas of guilty heretofore entered, it is my duty now to pronounce the judgment and sentence of the Court. Do you or either of you or your attorneys have anything you desire to say before sentence is pronounced?

(Mr. Espinosa presented a plea in mitigation on behalf of Defendants Brady and Tafoya.)

THE COURT: Other counsel desire to say anything?

(Mr. LaFollette presented a plea in mitigation on behalf of Defendant Brady.)

[fol. 3] (Mr. Chaves presented a plea in mitigation on behalf of Defendant Tafoya.)

THE COURT: Do either of the defendants desire to say anything?

DEFENDANT BRADY: No, sir.

DEFENDANT TAFOYA: No, your Honor.

THE COURT: The Congress in the wisdom of the law-making body, has imposed for offenses of this kind the severest of all penalties; that is, the death penalty could be inflicted upon a recommendation by a jury. That recommendation is absent this morning. As I said when they were here before, I was not inclined to submit the matter to a jury, but would accept their plea and pronounce sentence, which precludes the imposition of the death sentence. In that they may have been very fortunate. They may have escaped—had they gone to trial, a jury might have recommended the death penalty—I don't know. It would be within the province of the jury, under the facts of this case, to have made such a recommendation, but without the death penalty, the defendants are now subject to the extreme penalty of life imprisonment.

Mr. Espinosa discussed the purposes of criminal law and of punishment. Quite correctly he said the punishment cannot be disregarded; the protection of society is

essential, and the Court always considers the rehabilitation of the defendant. He did not mention that included within the protection of society is a matter which the Court must always consider, and that is the deterring effect of a sentence upon others who might be tempted to commit similar crimes. You are quite right, Mr. Espinosa, in saying that revenge never enters into the passage of sentence. There is never any animosity in the mind of this Court against any defendant, but the Court is charged with the responsibility of imposing [fol. 4] that sentence which, under the facts and circumstances of each particular case, is justified by all the considerations which enter into the passage of sentence and also consideration of the law and its purposes.

It doesn't make too much difference in this case whether a life sentence is imposed or whether a sentence of lesser amount, so long as it is more than 45 years, because even under life imprisonment all hope is not gone for a defendant. A Person who is sentenced to life imprisonment becomes eligible for parole after 15 years. The same is true of any sentence beyond the term of 45 years, so, regardless of the sentence that is imposed, the defendants will not be without hope. They will be eligible for parole under the provisions of law and their own conduct and other matters which the parole board, responsible officials, must take into consideration. No person, so long as there is life, is hopeless, and the death penalty will not be inflicted.

There is some difference between these two defendants. What was said about Tafoya is corroborated in large measure by the information I have received; yet he did participate. He participated in this, these acts. He knew the girl was frightened. He knew that she was going involuntarily, even before they crossed the state line. While he did cooperate and give a statement, nevertheless the difference is so slight, the same sentence shall apply to each defendant.

I will not further hold you in suspense nor lecture you. You have, by your plea of guilty, merited some consideration which you would not have otherwise received, and I am not unmindful of the fact that was stressed

by counsel, of your past records, also of the fact that your plea of guilty has saved this girl—and she is only [fol. 5] a girl—from further terrifying, embarrassing moments. I say "terrifying" because the experience which she underwent must have been most terrifying and even horrible.

It is the judgment and sentence of the Court that the defendants and each of them be imprisoned for the term of 50 years, that they be remanded to the custody of the Attorney General or his authorized representative, and appropriate orders and commitments issue.

That is all.

May I say to counsel, I appreciate your services in this case; all of you have done well. You spoke ably and eloquently.

That is all.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 7269

[File Endorsement (Omitted in Printing)]

ROBERT M. BRADY, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

ORDER FOR WRIT OF HABEAS CORPUS AD TESTIFICANDUM
—March 13, 1968

Upon motion of Petitioner for a Writ of Habeas Corpus ad Testificandum, it is

ORDERED that the Clerk of this court is hereby directed to issue a Writ of Habeas Corpus ad Testificandum directed to the Warden of the United States Penitentiary at Leavenworth, Kansas, to surrender Robert M. Brady, an inmate of said institution, to the United States Marshal for the District of New Mexico, or his deputy, or to the United States Marshal for the District of District of Kansas, or his deputy, in order that the said Robert M. Brady may be brought to Albuquerque in the District of New Mexico to testify as a witness at a hearing in the above-styled cause on the 20th day of March at 1:30 o'clock P.M.; and the said United States Marshal is hereby directed to return the said Robert M. Brady to the custody of the Warden of the United States Penitentiary at Leavenworth, Kansas when his presence is no longer required before this court.

DATED at Albuquerque this 13th day of March 1968.

/s/ H. Vearle Payne
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 7269

[File Endorsement (Omitted in Printing)]

ROBERT M. BRADY, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

ORDER FOR WRIT OF HABEAS CORPUS AD TESTIFICANDUM
—March 13, 1968

Upon motion of Petitioner for a Writ of Habeas Corpus ad Testificandum, it is

ORDERED that the Clerk of this court is hereby directed to issue a Writ of Habeas Corpus ad Testificandum directed to the Warden of the United States Penitentiary, McNeil Island, Washington, to surrender Alfonso Pedro Tafoya, an inmate of said institution, to the United States Marshal for the District of New Mexico, or his deputy, or to the United States Marshal for the Western District of Washington, or his deputy, in order that the said Alfonso Pedro Tafoya may be brought to Albuquerque in the District of New Mexico to testify as a witness at a hearing in the above-styled cause on the 20th day of March, 1968 at 1:30 o'clock P.M.; and the said United States Marshal is hereby directed to return the said Alfonso Pedro Tafoya to the custody of the Warden of the United States Penitentiary at McNeil Island, Washington when his presence is no longer required before this court.

DATED at Albuquerque this 13th day of March, 1968.

/s/ H. Vearle Payne
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 7269

ROBERT M. BRADY, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

MOTION FOR PRODUCTION OF DOCUMENTS—
Filed March 19, 1968

The Petitioner, ROBERT M. BRADY, by his attorney, hereby moves the Court for an Order requiring the Respondent, UNITED STATES OF AMERICA, to produce, pursuant to Rule 34 of the Federal Rules of Civil Procedure, certain documents for inspection and/or copying, to wit, a pre-sentence report by the United States Probation Office on the Petitioner, Robert M. Brady, in No. 19847 Criminal (D.N.M.) and a psychiatric report on said Petitioner by Dr. Brown in the same Criminal cause number, and would state to the Court that such inspection and/or copying is necessary to a proper presentation of his case.

/s/ Peter J. Adang
Attorney for Petitioner
P. O. Box 2168—1200 Simms Bldg.
Albuquerque, New Mexico

I HEREBY CERTIFY that I have delivered a copy of the foregoing pleading to all counsel of record, this 19th day of March, 1968.

/s/ Peter J. Adang
PETER J. ADANG

[fol. 69]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 7269—Civil

ROBERT M. BRADY, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

PRE-TRIAL CONFERENCE

BE IT REMEMBERED that on to-wit, the fourteenth day of December, 1967, at the hour of nine o'clock in the forenoon, the above matter came on for pre-trial conference before the Honorable H. Vearle Payne, United States District Judge.

* * * *

[fol. 78] MR. ADANG: Your Honor, may I ask one question? On the legal issue which is now before the Supreme Court, do you think that we should wait for an opinion to come down or go ahead?

THE COURT: Well, I didn't think that I would. I thought that I'd make up my mind one way or the other on it and of course if it isn't favorable to him and he isn't happy, why, he can appeal. Likewise, if the government isn't happy, they can take it up like they did the one on the judge in Connecticut, but I—of course, the Supreme Court may come down with an opinion in the meantime that will settle this once and for all.

Okay, I guess that's all, and thank you.

* * * *

[fol. 82]

TRIAL

BE IT REMEMBERED that on to-wit, the twentieth day of March, 1968, the above matter came on for hearing before the Honorable H. Vearle Payne, United States District Judge, sitting in open court without jury, at the hour of one thirty o'clock in the afternoon.

The appearances as noted in the caption hereof are again noted. * * *

(THEREUPON, the following proceedings were held in chambers.)

THE COURT: All right. You may proceed.

[fol. 83] EMMA BRADY MEDINA

was called as a witness on behalf of the petitioner, and having first been duly sworn testified upon her oath as follows, to-wit:

DIRECT EXAMINATION

BY MR. ADANG:

Q. Will you state your full name for the record, please?

A. Emma Brady Medina.

Q. What is your present address?

A. Nine oh five Princeton Drive, southeast.

Q. Are you related to Robert Brady?

A. I am his mother.

* * * *

[fol. 84] Q. Did you see Robert at any time after he was put in jail?

A. Yes, sir.

Q. On this charge?

A. Yes, sir.

Q. And in your first discussion with him, did you discuss the plea that he would enter?

A. Yes, sir.

Q. And what was his feeling as to what plea he should enter?

A. Not guilty.

Q. And did you concur in that plea?

A. Yes, sir.

Q. Did you have occasion after you discussed this plea with him to change your mind as to what plea he should enter?

A. Yes, sir.

Q. And did you subsequently advise Robert that he [fol. 85] should change his plea?

A. Yes, sir.

Q. And what did you advise him? Will you tell the Court?

A. Well, should I tell about the call I got?

Q. Well, no. Why don't you just tell what you told Robert.

A. Well, I just told him to plead guilty.

* * * *

[fol. 86] Q. (Mr. Adang continuing.) Mrs. Brady did you tell your son anything else—now, I don't want you to repeat anything about a conversation with Mrs. Tafoya, but did you tell him anything else other than that he should plead guilty?

A. Yes, sir. I said, "Plead guilty or they are going to give you the death sentence."

Q. And was that all?

A. Yes, sir. I was not allowed to visit him at the time because it wasn't visiting hours, and I went through the alley of the city jail.

Q. All right. Do you want to rest for a moment?

A. No. I am okay. I went through the alley of the city jail where he was being held and I kept yelling, "Brady. Brady." Then—

[fol. 87] Q. Take your time.

A. Then there was somebody, some fellow up there that yelled, "Is there a Brady here?" So then Brady came to the window. It was upstairs. I don't know how many floors. Brady came to the window and he said, "Mom, what are you doing? You are going to get yourself in trouble," and I just said, "For God's sake, plead guilty. They are going to give you the death sentence."

* * * *

[fol. 90]

ROBERT M. BRADY

was called as a witness on his own behalf, and having first been duly sworn testified upon his oath as follows, to-wit:

DIRECT EXAMINATION

BY MR. ADANG:

Q. Would you state your full name for the record, please?

A. Robert M. Brady.

* * * *

[fol. 91] Q. Are you in the custody of the federal government?

A. Yes, sir, I am.

Q. And what is the reason that you are in custody?

A. I am in custody because I pled guilty to kidnapping.

Q. And when did this occur?

A. In May of 1959.

Q. And what sentence were you given as a result of that guilty plea?

A. I was given a fifty year term.

* * * *

[fol. 95] Q. Now, after the authorities arrested you, Mr. Brady, where did they take you?

A. To the Albuquerque City Jail.

Q. And how long were you in the city jail?

A. Approximately two weeks.

Q. And during this time, where was Alfonso Tafoya?

A. Right there with me.

Q. Did you ever have occasion to discuss the case with him while he was in jail?

A. At all times.

Q. And during this time, this two-week period that you were in the city jail, did you formulate an opinion in your own mind as to what plea you would enter?

A. I did, and we both entered a plea of not guilty.

[fol. 96] Q. Then it was your decision at that time that you were going to plead not guilty?

A. That was my decision.

Q. Mr. Brady, did you know during this period of two weeks that you were in the city jail whether or not Alfonso Tafoya had made any confession or given any statement to the authorities?

A. At this time, I had no knowledge of Alfonso Tafoya giving a statement to the authorities.

Q. Did you give any statement to the authorities?

A. I never gave a statement to the authorities.

Q. Did you ever subsequently learn that Alfonso Tafoya had given a statement to the authorities?

A. Several months later.

Q. During this two-week period again that you were in city jail, did you have occasion to consult with your attorney?

A. He came up once to the best of my knowledge.

Q. Was this Mr. LaFolette?

A. Yes, it was.

Q. Was any other attorney present?

A. I'm not sure whether Mr. Espinosa was with him. I know I saw Mr. LaFolette and Mr. Espinosa at the time of the arraignment when we pled not guilty.

Q. I'm talking about the time you were in city jail [fol. 97] during the first two weeks.

A. I am not positive.

Q. Were any other persons other than yourself and Mr. LaFolette present to your knowledge?

A. Alfonso Tafoya.

Q. Did Mr. LaFolette discuss the case with both of you?

A. He did.

Q. Did you discuss at that time what plea you would enter to the charge?

A. We did.

Q. And what did you tell Mr. LaFolette at that time?

A. That we were not guilty, and that we would enter a plea of not guilty.

* * * *

[fol. 98] Q. What plea did you enter at that arraignment?

A. We entered a plea of not guilty.

Q. Did you advise your attorney before this arraignment that you were going to plead not guilty?

A. We did.

Q. To your recollection and knowledge, did he concur in this plea?

A. Yes, he did.

Q. What happened after the first two weeks that you were in city jail?

A. We were transferred to the Santa Fe County Jail and held there.

Q. When you say "we were transferred" who do you mean?

A. Alfonso Tafoya and myself were transferred to the Santa Fe County Jail.

Q. How long were you in the Santa Fe County Jail?

A. Approximately two weeks.

Q. And during this period, you were in Santa Fe County Jail for two months with Alfonso Tafoya, did you have occasion to discuss the case with him?

[fol. 99] A. Continuously at all times.

Q. And during this period you were in the Santa Fe County Jail, did you ever change your mind as to what plea you would enter?

A. No, I didn't.

Q. Did you still want to enter a plea of not guilty?

A. Definitely.

Q. Did Alfonso Tafoya during this period indicate to you that he might want to change his plea?

A. No, he didn't.

Q. Now, during this period you were in the Santa Fe County Jail, did you ever have an opportunity to consult with counsel?

A. Yes. Both of us at all times. Both of us—we both consulted with our counsel.

Q. Well, how many times during this period of time you were in the Santa Fe County Jail?

A. Once or twice. May I make a statement at this time?

* * * *

Q. Who was present at these meetings when you consulted with your counsel?

[fol. 100] A. Alfonso Tafoya, myself, and Mr. LaFolette and Mr. Espinosa.

Q. All of you were together?

A. Yes, sir.

Q. At these meetings?

A. Right.

Q. How many meetings were there, do you know?

A. One, possibly two.

Q. And what was discussed at these meetings?

A. The information that Alfonso Tafoya and I presented to the attorneys so they could investigate with a determination towards helping us prove our innocence.

Q. During this period of time that you were in the Santa Fe County Jail, did you learn that Alfonso Tafoya might have given a statement or confession to the authorities?

A. No, I did not.

Q. What was your feeling during this period as far as your plea? Were you going to—

A. I was going to plead not guilty and I thought I would be found not guilty.

Q. Did your attorneys at any time during this period or on the occasion of these two meetings advise you that you should change your plea?

A. Not at this time.

* * * * *

[fol. 101] Q. Now, while you were in the city jail on this second occasion after you came down from Santa [fol. 102] Fe County, did you consult with your attorney at all?

A. I believe so. For about one time, I believe he came up to see me.

Q. And who came?

A. I believe both Mr. LaFolette and Mr. Espinosa. Possibly just Mr. LaFolette himself. I believe Mr. Espinosa was there also.

Q. What did you discuss at that time?

A. Trying to find out information that I had given them, if they were investigating to determine—to find witnesses to prove my innocence.

Q. At that time, did you give any information to Mr. LaFolette that you wanted to change your plea?

A. No, I didn't.

Q. Did he give any indication to you that he wanted you to change your plea?

A. Not at this time.

Q. And to the best of your knowledge, then, at this time he still concurred in your plea of not guilty?

A. Yes, he did.

* * * *

Q. Were there any other meetings between you and counsel after this meeting with Mr. LaFolette?

[fol. 103] A. Yes. Approximately about—I would believe around the thirtieth of April, we were taken to the federal building and we were taken to a little conference room where Judge Chavez and both counsel and myself and Tafoya were placed in this room for discussion.

Q. Now, when you say "we", who do you mean?

A. I was taken from the Albuquerque City Jail and Alfonso Tafoya was taken from the Santa Fe County Jail.

Q. Again, who was present?

A. Judge Chavez, Mr. Espinosa, and Mr. LaFolette.

Q. Now, can you tell us what the discussion was at that meeting?

A. At that meeting, I was under the impression that we were going to start discussing the manner in which we were going to present our case to the Court. What transpired was a little different.

When I got to the meeting, I thought this was going to happen and I was shown a statement that Alfonso Tafoya gave to the authorities, and from this moment on, every effort was made to induce me to plead guilty.

* * * *

[fol. 104] Q. At this time, were you thinking that you should still go ahead with your plea of not guilty?

A. Yes, I did.

Q. Did your—did any of the attorneys present at that meeting indicate that you should change your plea prior to the time they handed you the statement?

A. No. No one did.

Q. Nothing then was said to discourage your plea?

A. Not until after the statement was handed to me.

Q. All right. Who handed you the statement?

A. I would think that Mr. Espinosa handed me the statement. I believe, to the best of my ability, Mr. Espinosa.

Q. When he handed you the statement, did he say anything to you?

A. Yes, he did. He said, "How do you expect to fight this case with this statement that is going to be used against you?"

Q. Are those his exact words to the best of your recollection?

A. To the best of my recollection.

Q. What did you do then?

[fol. 105] A. I read the statement and I felt pretty bad about it.

Q. What do you mean you felt bad about it?

A. Well, I felt bad about what was said in the statement because the statement was not accurate. The statement was a lie.

Q. Did the statement tend to incriminate you?

A. Definitely.

Q. Did you have at that time any feeling with regard to the plea that you would enter after you had read the statement?

A. Well, after I was spoken to, yes. After I was told that there was no defense, that all I could do was plead guilty, then I had no choice but to plead guilty.

* * * *

[fol. 106] Q. Was any mention made of the death penalty if you continued to persist in your plea of not guilty?

A. Yes, there was.

Q. What was said and who said it?

A. Mr. LaFolette, I believe, was the one that said it. That if I went to trial and took—jury trial, that there was a great possibility at this time that I would be given the death sentence.

Q. Did that influence your decision in any way?

A. Very much so.

Q. Well, how did it influence you?

A. Well, up to this period of time, I thought that Alfonso Tafoya and I were both pleading not guilty. At this time, I thought, well, if Alfonso Tafoya and I both pled not guilty and he testified on this, I thought I had a chance, but due to the fact when I seen he was going to plead guilty—at this time, also, Alfonso stated to me [fol. 107] that he would testify for me. But, it just seemed very difficult for me to believe that any jury would believe Alfonso Tafoya testifying to me that I was not guilty when he in fact had pled guilty to this crime. So, I just couldn't grasp the situation quite right, you know.

* * * *

[fol. 108] Q. Did you at that meeting then decide to change your plea to guilty?

A. Yes, I did.

Q. And would you tell the Court what motivated that decision?

A. My attorneys, statements by Alfonso Tafoya, the great risk of a death sentence.

* * * *

Q. Did you then make the decision that you would plead guilty?

A. Yes, I did.

Q. At that time, did you believe you were guilty?

A. No, I didn't.

* * * *

[fol. 114] Q. (Mr. Adang continuing.) Mr. Brady, between the time you actually pled guilty and—well, strike that.

At the time that you came before the court for sentencing, did the court at that time inquire into the voluntariness of your plea of guilty?

A. Yes, the judge did.

* * * *

[fol. 115] Q. (Mr. Adang continuing.) After the court made this inquiry of you, Mr. Brady, did you change your plea again?

A. No, I didn't. I reluctantly let my plea of guilty stand.

Q. Will you tell the Court why you did that? Well, let me ask you this question: Did the court make an inquiry of you concerning whether there were any understandings or agreements in return for your plea of guilty?

A. Yes, the court did.

Q. And what was your reply to that?

A. That there was no agreement.

Q. Why did you make that reply?

A. Because at the time we were in this conference room, I was told that my guilty plea would not be accepted if I ever said that any agreements were made before I entered my guilty plea.

* * * *

[fol. 116] Q. Are you still serving the same fifty-year sentence, Mr. Brady?

A. I am still serving time, but not the same fifty years. My sentence has been reduced to thirty years.

* * * *

Q. (Mr. Adang continuing.) Mr. Brady, at any time [fol. 117] during the course of these events in 1959, did you believe you were guilty?

A. Never.

Q. Do you believe now that you are guilty?

A. I'm not guilty. Not even now.

Q. This motion to vacate sentence has been brought approximately nine years after your plea of guilty. Is this the first time you have raised this question?

A. No, I have sent in many motions to the court but this is the first time that a motion has been entertained in this Court.

* * * *

CROSS EXAMINATION

BY MR. McCARTY:

* * * *

[fol. 118] Q. You say that you talked to your co-defendant Tafoya many times in Albuquerque and Santa Fe jail about the facts of this case?

A. Yes, I did.

Q. Did he ever tell you when he first gave a written confession concerning this case?

A. Never.

Q. Do you know whether or not he had given that confession immediately upon being arrested?

A. No, I did not.

Q. Do you know when he gave the confession?

A. I do now.

Q. And when was that?

A. Immediately after arrest.

Q. And you are saying that for a month in Albuquerque, is that how long you stayed in Albuquerque jail before you went to Santa Fe?

A. For approximately two and a half months I didn't know.

Q. And for a month in Albuquerque, you were with the defendant Tafoya?

A. Two weeks, approximately.

[fol. 119] Q. And then up in Santa Fe?

A. For about two months.

Q. And you talked about this constantly?

A. Yes.

Q. And he never mentioned this?

A. Right.

Q. And the first time you saw that statement—

A. Was when I was taken into this conference room.

Q. Gilbert Espinosa handed it to you?

A. Right.

Q. When was the first time that you knew that your co-defendant Tafoya was going to enter a plea of guilty?

A. When my mother came and hollered up through the window of the Albuquerque City Jail and told me to

enter a plea of guilty, that Alfonso Tafoya was entering a plea of guilty.

Q. And when was this in relation to this little conference on the twenty-first of April that you talked about?

A. Probably a week before or ten days.

Q. But that's all that your mother told you?

A. No. At this time she told me, "Please, son, enter a plea of guilty because they are going to burn you."

Q. Well, you were aware, weren't you, that this was a capital offense?

[fol. 120] A. I was.

Q. When did you first become aware of that?

A. Every time I read a newspaper.

Q. Well, shortly after your arrest in January?

A. Right.

Q. So, you knew that it was a capital offense?

A. Yes, I did.

* * * * *

[fol. 121] Q. You didn't know who they were talking [fol. 122] to, trips they made, investigation that they performed?

A. Oh, I know of an investigation. I know of a witness that he went to talk to that I had told him to see which he subsequently said, "Well, that witness won't be any good because he is an exconvict," which I didn't know that the man was an exconvict when I told him.

* * * * *

Q. When was the first time there was ever any discussion about your entering a plea of guilty in this case?

A. On the twenty-first in this room, in the conference room in the Federal Building.

Q. But you had known before that that Tafoya was going to enter a guilty plea?

A. A few days before.

Q. You were aware, were you not, that Tafoya could testify in your trial?

A. Yes, I believe I was afterwards. I was aware.

Q. You were aware of that on the twenty-first of April, were you not?

A. Right.

[fol. 123] Q. You were aware of that before because you say that he had told you he would testify on your trial?

A. On the twenty-first of April in this room when I read this statement. I was standing there reading this statement and Tafoya denied making this statement to me.

* * * *

[fol. 127] Q. Yes, and before that, you had been absolutely certain of your innocence and had intended to go to trial and plead not guilty?

A. Yes, I did.

Q. Because you were innocent?

A. Yes, I was, and I am.

Q. And this conversation lasted how long?

A. Forty-five minutes, half hour.

Q. And you knew that you could get up to life, that that's what the statute provided?

A. No, not at this time I didn't know that.

Q. When did you first learn that?

A. When Judge Hatch told me.

Q. What did you think you could get when you were having this conversation, the maximum?

A. Death.

Q. That was the maximum?

A. Yes.

* * * *

[fol. 128] Q. Before the conversation, what did you think you could get, maximum time?

A. Well, before the conversation, I never even thought of time because I thought I would be found innocent. I didn't even think in these terms of time.

Q. You said you read the newspaper and you were aware it was a capital offense?

A. Right, death sentence. But, I never even thought of term of years. I thought of innocent if I pled not guilty and a term of years if I pled guilty.

* * * *

[fol. 129] ALFONSO PEDRO TAFOYA

was called as a witness on behalf of the petitioner and [fol. 130] having been first duly sworn, testified upon his oath as follows, to-wit:

DIRECT EXAMINATION

BY MR. ADANG:

Q. Will you state your full name for the record, please?
A. My name is Alfonso Pedro Tafoya.

* * * *

[fol. 135] Q. I'm talking about—I believe you indicated that you made the statement right after you were arrested, is that correct?

A. Right.
Q. And then you were put in city jail?
A. Right.
Q. And then did you see Robert Brady in the city jail?
[fol. 136] A. He was brought in afterwards, like I said.

Q. Did you discuss your case with him?
A. That night, yes. That night, yes.
Q. And what about the case did you discuss?
A. About?
Q. How you were going to plea?
A. First I told him that—what had happened. Then I told him what I did, then I told him that we have nothing to worry about. I says, "They charged us with something we don't do. We are going to plead guilty to this thing that they are going to charge us with." I mean innocent. "That we are going to plead to innocent on this charge."

Q. In other words, you were going to plead not guilty?
A. Not guilty.
Q. Did Robert Brady indicate to you what he was going to plead?
A. We were both going to plead the same thing.
Q. On how many occasions—now, while you were in the city jail, how many occasions did you discuss the case with Robert Brady?

- A. On how many occasions?
- Q. Yes.
- A. I can't recall how many, but I know that we dis-
[fol. 137] cussed it.
- Q. Was it more than once?
- A. I don't remember.
- Q. Were you taken anywhere then from the city jail?
- A. Yes. We were taken to Santa Fe.
- Q. Santa Fe County Jail?
- A. Yes.
- Q. Did Robert Brady go to the Santa Fe County Jail?
- A. Yes. We both went to the Santa Fe County Jail?
- Q. While you were up in the Santa Fe County Jail, did you have an opportunity to discuss the case with him?
- A. Yes, we were together.
- Q. And at that time, what did you discuss?
- A. About, you know, we are going to plead not guilty and so on. I mean really it wasn't too much to discuss, only that we are going to plead not guilty and get our lawyers to help us on our case.
- Q. While you were in the Santa Fe County Jail, you believed you were not guilty?
- A. Yes. I still believe I am not guilty.
- Q. And did Robert Brady indicate to you what he felt?
- A. Yes.
- Q. What was his feeling?
- A. That we weren't guilty.

* * * *

- [fol. 138] Q. But, you do recall talking to a lawyer when you were in the Santa Fe County Jail?
- A. Yes.
- Q. What lawyer did you talk to at that time?
- A. I talked to Dave Chavez, my uncle.
- Q. Was Gilberto Espinosa there at that time?
- A. At that time, I don't remember.
- Q. Do you recall if anyone else besides yourself and Judge Chavez were present at that meeting?
- A. I don't remember.

Q. Now, at that time, what did you tell Judge Chavez about the case with respect to the plea you wanted to enter?

A. Well, the first thing, he told me who he was. I didn't know him, and he told me who he was and that [fol. 139] my dad had hired him to represent me and that is when first I heard the name of Mr.—what's his name, the other lawyer I am supposed to have? Espinosa. He told me that he was going to represent me, that Mr. Espinosa was going to gather evidence for my case and not to worry. He told me—he says that he would help me, you know, in the case.

Q. Did you tell him at that time what plea you wanted to enter?

A. Yes.

Q. What was that?

A. Not guilty.

Q. Did he advise you against that?

A. Then?

Q. Yes.

A. No, not the very first time that I seen him.

Q. Did you thereafter decide that you wanted to change your plea to guilty?

A. That same day, you mean?

Q. No. At any time thereafter.

A. No. I never changed my mind to change my plea. No.

Q. Well, did you ultimately decide you wanted to plead guilty?

A. No. I never decided to plead guilty.

Q. You didn't?

[fol. 140] A. No.

Q. Well, how did it come about that you did enter a plea of guilty?

A. Well, they told me to plead guilty. Dave Chavez told me to plead guilty.

Q. When did he tell you this?

A. There in Santa Fe on one of the visits.

Q. All right. What did he say to you at that time?

A. He said that the case looked bad and—

* * * *

[fol. 141] Q. (Mr. Adang continuing.) After this meeting with Judge Chavez, did you ever talk with Robert Brady?

A. Yes.

Q. Did you discuss this meeting with Robert Brady?

A. Yes.

Q. And what did you tell Robert Brady at that time?

A. I told him that they had told me that they were going to plead me guilty, for me to plead guilty, told me to plead guilty. Anyway, they were talking about the death sentence; that he told me that I would get the death sentence if I was found guilty; that there was no alternative; and that if I pleaded guilty, that he wanted me to plead guilty so I could get—he said I would get five or seven years.

Q. And who said this to you?

A. Dave Chavez.

Q. And you told this to Robert Brady?

A. Yes, because he told me that he couldn't get—that he probably wouldn't get the same thing. He told [fol. 142] me that Robert Brady was the agitator in the thing. What he meant, I don't know. But, Brady would get twice what I got, and that I would get five to seven years, so I figured Brady would get ten to fifteen.

Q. And you informed Robert Brady of this?

A. Yes. They told me that that's what we would get.

* * * *

[fol. 143] Q. At any time prior to this meeting, do [fol. 144] you recall Robert Brady ever telling you that he wanted to change his plea to guilty?

A. Yes. Brady always wanted to change his plea to guilty.

Q. You mean he always wanted to plead guilty?

A. Innocent. I'm sorry.

Q. You mean prior to this meeting, he always wanted to plead not guilty.

A. He wanted to plead not guilty, yes. Innocent is what I am thinking of.

Q. To the best of your recollection, when did he first say that he wanted to plead guilty?

A. Brady?

Q. Yes.

A. Brady always wanted to plead innocent until they told us what the—Judge Chavez told me that I would get this time and he would get twice as much as I would get, five, ten, or fifteen, and he always wanted to plead not guilty.

Q. Was it at that meeting that he then said he would plead guilty?

A. Yes.

Q. Did he say he would plead guilty?

A. I think.

* * * *

[fol. 146] Q. During this period of time before you pled guilty, whenever you were with your attorneys, was the death penalty discussed?

A. Ask that again?

Q. Well, when you were with your attorneys conferring with them prior to the time you pled guilty, did your attorneys ever discuss with you the possibility that you could get a death sentence?

A. They didn't discuss the possibility. They told me I would get the death sentence if I pled not guilty and was found guilty; that I would get the death sentence, and that scared me.

Q. And did this fact influence your decision to go ahead and plead guilty?

A. Well, at first, no. I figured, "Well, I'm going to get big time anyway, probably." I figured, you know, since they were going to take my life if they found me guilty, so I asked him and he says, "No, you will get from five or seven years," and that looked better to me than the death penalty.

* * * *

[fol. 147]

CROSS EXAMINATION

BY MR. McCARTY:

* * * *

Q. You did give a confession to the F. B. I. shortly after you were arrested, did you not?

A. Yes, I did.

Q. Did you ever tell your co-defendant about that?
[fol. 148] A. Yes. Yes, I did.

Q. When did you tell him about that?

A. After they brought him—after he come—I don't know where, but I never did see him until after this. I was in a cell when they brought him in and I told him that I did not write no confession. I told them what I had done that night that they were asking me about.

Q. And you signed that confession, did you not?

A. I couldn't read it, no. So, they asked me to sign it and I barely did sign it. I couldn't write it myself because I was—I guess I was an alcoholic. I couldn't even hold the pencil steady in my hand enough to write so they said they would type it, but I told them to put down what I was telling them.

Q. And you told your co-defendant that you had given this confession?

A. Yes. Yes, I did.

Q. When was it that you decided to enter a guilty plea?

A. When was it that I decided to enter a guilty plea? When Judge Chavez went to Santa Fe to see me. Not the first time. You are talking about the guilty plea, right?

Q. That is the question.

A. You see, I forget. I still got that—because I have been away so long, I forget. He told me that for me to [fol. 149] plead guilty. He told me to plead guilty for reasons. Then he told me the reason. He told me that he didn't think we had a chance; that I was going to get the death penalty because my co-defendant or Robert Brady, whatever you want to call him, had no chance of beating the case, and that it was a big bad thing that he had done—we had done, whatever you want to call it, you know, but I don't remember exactly if he said "we" or "him". But, since we are both in it, so it is "we". And that my part in it was—that they could tell that he was the agitator. In other words, that he was the ony that did the whole thing and that he would get found guilty and he would get the death penalty and

since him getting the death penalty, that they had no other choice but to give me the death penalty, and this, of course, scared me.

* * * *

[fol. 156] GILBERTO ESPINOSA

was called as a witness on behalf of the defendant, and having been first duly sworn, testified upon his oath as follows, to-wit:

[fol. 157]

DIRECT EXAMINATION

BY MR. McCARTY:

Q. Would you state your name and your profession, sir?

A. Gilberto Espinosa. I am an attorney.

Q. How long have you been an attorney?

A. I was admitted to the bar in 1921.

Q. Have you practiced in the State of New Mexico since that time?

A. I have.

Q. Have you ever held any public office, Mr. Espinosa?

A. I served as Assistant United States Attorney for approximately fourteen years in this district.

Q. Have you have any experience other than that in trial of criminal cases, sir?

A. I have been in the active practice—at that time, assistants did not have to devote his entire time, and I had considerable practice in district court and in other courts.

Q. Have you ever in 1959, had you ever defended a capital case?

A. Prior to 1959, I was associated with Senator Chavez in—oh, I would say four cases. I represented a capital case in the supreme court on appeal. I was called [fol. 158] in after the defendant had been convicted and I was retained by colored people throughout the state, and I represented the defendant in that case on appeal.

Q. And you have had other criminal cases that you had defended at that time?

A. Hundreds.

Q. And prosecuted quite a few, I imagine.

A. Well, I don't know. I expect I appeared before a jury a thousand times in the fourteen years I was in the United States Attorney's office.

[fol. 159] Q. What plea was entered to the best of your recollection, first, in the criminal case?

A. When we talked to them at Santa Fe, Mr. Brady was unwilling—he was asserting his innocence. I understand that at the hearing before Judge Mowry, which I was not present, both entered appearance of not guilty. I am sure of this because afterwards, I contacted several [fol. 160] of the relatives of Tafoya in an effort to try to obtain bond for him. The only time I recollect that I saw them together was at the time they were before Judge Hatch.

Now, I may have talked to them at the jail here in Albuquerque. I would not say that I did not.

Q. About a week before they entered their change of plea from not guilty to guilty, did you meet—you and the five people I have just named, meet in the Federal Building and discuss privately among yourself the possible outcome of a guilty plea?

A. Yes. To this extent: When we were in the Federal Building, Mr. LaFolette and I were the only ones that had any conversation where Brady was present.

Q. What was the nature of that conversation?

A. Most of the conversation was had between Mr. LaFolette and Brady. At that time, as I understood, Tafoya had informed Chavez that he was ready to change [fol. 161] his plea; that he was going to enter a plea of guilty. The conversation that was had with Brady and Tafoya when I and LaFolette were present at the Federal Building was concerning the plea that Brady would enter. Tafoya had agreed to—or I won't say agreed. He had made up his mind and informed us that he was ready to plead guilty.

Q. In talking to Mr. Brady, did you make any representations to him that he would get any special treatment, or that he would receive anything if he would enter a guilty plea?

A. I certainly did not.

Q. Did you represent to him that he would get a certain term of years?

A. I did not. He was informed as to the sentence that the statute provided, and so far as I was concerned and Mr. LaFolette also, he was informed that that was a matter entirely for the court.

Q. Did you have any discussion with him about the possibility of someone later seeking executive clemency after he had been sentenced?

A. I did not.

Q. You did not?

A. I did not.

* * * *

[fol. 162]

CROSS EXAMINATION

BY MR. ADANG:

* * * *

Q. Now, were you at any of the conversations between Mr. LaFolette and Robert Brady? Were you present?

A. The conversation we had at the jail in Santa Fe and at the Federal Building here.

Q. All right. At the time you were at the jail in Santa Fe, do you recall then what was discussed?

[fol. 163] A. Mr. LaFolette had personally gone to El Paso and made a complete investigation of Mr.—and Mr. LaFolette informed both of them as to the results of his investigation.

Q. You say Mr. LaFolette informed both of them. Was Tafoya present at that time?

A. I believe he was. I wouldn't be certain. They were both together, I believe.

* * * *

[fol. 164] Q. Now, in this conversation that you had in the Santa Fe County Jail in the presence of Mr. LaFolette and Mr. Tafoya and Mr. Brady, did Mr. Brady indicate to you what he wanted to plead at that time?

A. He did not indicate to me. He indicated that he was—Mr. LaFolette was principally talking to him. I was there and I gave my opinion and advice when it was opportune, and they asked for it. He did indicate that he did not want to plead guilty.

Q. Did Mr. Tafoya say anything with respect to his plea at that time?

A. He had made up his mind to plead guilty.

Q. Did Mr. Tafoya make up his mind to plead guilty in your presence?

A. No.

Q. And who was he with at the time he made up his mind?

A. My understanding was that he had communicated that information to Judge Chavez. When we were at the Federal Building, he reaffirmed that intention and I was present.

Q. Well, this information that he had decided to plead guilty was not communicated directly by him but by someone else, is that correct?

A. It was communicated by him to Judge Chavez.

* * * *

[fol. 165] Q. Did you ever try to obtain bond for Brady?

A. No. As a matter of fact, my principal participation in behalf of Brady came when we were before Judge Hatch after he had entered a plea, and in my plea to Judge Hatch, I interceded for both.

Q. Would that be at the time of sentencing or at the time of the plea?

A. After the plead had been entered and after—I don't think he was sentenced immediately. I don't remember. I think they—maybe the next day or I don't recall.

Q. You say at that time you made a plea to the court on behalf of both?

A. Yes. Yes, sir.

* * * *

[fol. 166] Q. I believe you indicated to Mr. McCarty that you were present at a meeting in the Federal Building at which Judge Chavez, Mr. LaFolette, and Mr. Brady, and Mr. Tafoya, were all present?

A. Yes. We were all there.

Q. Can you tell us what was discussed at that meeting?

A. They had made their determination to enter a plea of guilty, and we generally discussed the situation. There was no assurance made by anyone as to what the sentence would be.

Q. Well, when that meeting first started, Mr. Espinosa, wasn't Mr. Brady still persisting in his plea of not guilty?

A. Not to my recollection.

Q. Well, can you tell me when he first decided he was going to plead guilty?

A. Sometime prior to the time we appeared before Judge Hatch.

* * * *

[fol. 167] Q. Well, let me ask you this, Mr. Espinosa: Isn't it true that Mr. Brady originally pleaded not guilty?

A. That is my understanding. I was not present.

Q. Then, as I understand it, the second time he appeared before the court was when he changed his plea to guilty, is that correct?

A. That is my recollection.

* * * *

[fol. 168] Q. Yes, sir. But, I asked you how long was this meeting that took place before the time you appeared in court?

A. You say how long it was before the meeting. It was the same meeting. I don't think it lasted more than fifteen or twenty minutes.

Q. Yes, and then how long was it then before you went into court and he changed his plea?

[fol. 169] A. Right away.

Q. Was that the same day?

A. Yes.

Q. And it is your recollection that he had already made up his mind when he went into that meeting to change his plea to guilty?

A. Yes, sir.

Q. Do you know when he changed his plea to guilty or when he decided to change his plea to guilty?

A. I can't say. This was eight years ago and at that time, why, I kept no particular notes. But, I am certain that when he appeared before Judge Hatch and all of us were there, his mind was made up and he entered his plea, and there was no coercion on the part of anyone to influence that plea.

Q. Was there ever any representation made by you, Mr. Espinosa, that if Robert Brady pled guilty, the Chavez family would work to get him a reduced sentence?

A. There certainly was not.

Q. Did you ever make any specific representation to him as to the length of time he would spend in jail if he pled guilty?

A. No, sir, I did not.

Q. Did you at any time discuss with Mr. Brady the possibility of the death penalty if he continued to plead [fol. 170] not guilty?

A. That was discussed, yes.

Q. And can you recall what you said to him in regard to that?

A. No, I cannot recall except that the law and the consequences were explained to both of them.

Q. Did you ever tell him that he would definitely get the death penalty if he pled not guilty and went before a jury?

A. No.

Q. Mr. Espinosa, did you ever specifically represent to Mr. Brady that—well, let me retract that and establish a foundation for it.

Did you know that Mr. Tafoya had made a confession to the authorities?

A. Yes, sir.

Q. When did you first become aware of that?

- A. Almost as soon as I was employed in the case.
Q. Did you ever inform Mr. Brady of that?
A. I think he was told about it. I think he knew about it.

* * * *

[fol. 171] Q. Did you ever inform Mr. Brady of the possibility that he could continue to plead not guilty and waive a jury trial?

A. My recollection is that—
MR. McCARTY: Excuse me, Mr. Espinosa. I want to object to the form of that question. The federal rules do not permit a waiver of jury trial on the instance of the defendant only.

THE COURT: Well—

MR. ADANG: I understand. That is why—

THE COURT: I am not ruling on that, but I am going to let him state what may have been said.

A. I will answer that question. In the discussions that we had, the record will—the correspondence and everything else will show that I definitely was of the opinion that Judge Hatch would not try that case upon a plea of not guilty; that he would not try the case without a jury.

Q. (Mr. Adang continuing.) Did you ever discuss that with Judge Hatch?

A. No.

[fol. 172] Q. It was merely your opinion, then, is that correct?

A. It was my opinion and I think I was right.

* * * *

ROBERT H. LA FOLETTE

was called as a witness on behalf of the respondent, and having been first duly sworn, testified upon his oath as follows, to-wit:

DIRECT EXAMINATION

BY MR. McCARTY:

Q. Would you state your name, sir?

[fol. 173] A. Robert H. LaFoette.

Q. And what is your profession, sir?

A. Attorney at law.

Q. And when did you first begin the practice of law?

A. Nineteen twenty-five.

Q. Where was that, sir?

A. Here in Albuquerque.

Q. Have you practiced law from that time until 1959?

A. Yes.

Q. In 1959—

A. No. In 1968, I retired.

Q. In 1959, however, you were practicing law?

A. Yes.

Q. And did you at that time represent Mr. Robert Brady in a criminal case in the United States District Court?

A. Yes, I did.

Q. By whom were you retained?

A. I represented Robert in a divorce case the year before and had represented his mother on numerous matters and she called me the night he had been arrested, and asked if I would run to the jail as fast as possible, because he had been held on a federal charge of kidnapping. I went down to the jail and talked to him. He [fol. 174] asked me to go ahead with the case. I did.

You might say I came back to my office and the Tafoya family, Mr. Tafoya, the family of young Tafoya in this case, was there, and wanted to employ me. I told him that I had just learned from Robert Brady that Mr. Tafoya had given a very damaging statement to the F. B. I., and, therefore, that I felt there would be a conflict and I couldn't take their case and I urged them to get Mr. Espinosa.

* * * *

Q. Mr. LaFolette, did you practice any criminal law prior to 1960?

A. I practiced thirty years of it.

Q. And during that time, did you represent ever a defendant in a capital case?

A. Yes. I had represented many criminals.

Q. And did you represent other people?

[fol. 175] A. In capital cases, I had represented many defendants.

Q. Did you represent other people in felony cases?

A. Oh, I had represented hundreds of cases, and I can gladly enumerate some of them if the Court would like further—

THE COURT: I don't think that will be necessary.

Q. (Mr. McCarty continuing.) That won't be necessary. You won some and lost some, I imagine.

A. Won some and lost some. But, I might say I never had one where the defendants had tied themselves up in a sack like they had in this one.

MR. ADANG: I'm going to object to that answer, Your Honor.

THE COURT: Yes. That will be stricken.

Q. (Mr. McCarty continuing.) Did you conduct any investigation in the case involving Mr. Brady?

A. I certainly did.

Q. Did you interview Mr. Brady about the case?

A. Several times. I interviewed Mr. Brady and I went down to El Paso at his suggestion to interview various witnesses.

Q. Who did you interview in El Paso?

[fol. 176] A. I interviewed a couple of barbers that he had talked to during the time he was in Juarez.

Q. Had he given you their names as possible witnesses?

A. Yes. And I interviewed some in El Paso where they had been in the neighborhood selling the car.

Q. Who was conducting the other investigation? Did you conduct any other investigation?

A. I did. I did a great deal of briefing involving the question of the Tafoya confession.

Q. Did you discuss the matter with anyone in the United States Attorney's office?

A. I certainly did, and they were very free in showing us statements of prospective witnesses.

Q. They went beyond the discovery rules?

A. Yes.

Q. And gave you more information than they were required to?

A. They certainly did. They showed us the statements of various witnesses that would be very damaging.

Q. They opened their file to you?

A. Opened their file more or less.

Q. Did you ever have any discussion after you had conducted your investigation? Did you have any discussion with Brady about the merits of his case?

[fol. 177] A. Yes. On two occasions, I discussed the seriousness of certain testimony and asked him one time before he learned that Tafoya was pleading guilty, I asked him if he still wanted a jury trial and he said, "Yes," he did.

Q. Did you discuss with him—

A. And I certainly never did try to prevail on him not to have a jury trial as long as he said he wanted one.

Q. Did you discuss with him after you learned that Tafoya was going to plead guilty, did you discuss with him—

A. Yes.

Q. —the merits of the case?

A. I did. But I didn't have to discuss very much because as I walked up to him and began to explain what I had learned about Tafoya, and I said, "Under all the circumstance, I believe you should plead guilty," and he said, "Yes." He said, "I have changed my mind. I want to plead guilty."

Q. Your judgment in this matter is based on your experience as a lawyer and the facts—

A. Yes.

Q. —of the case?

A. I could definitely say we could not go before a [fol. 178] jury with this case.

Q. Did you ever discuss with Mr. Brady what his sentence might be?

A. What his sentence might be?

Q. If he would plead guilty.

A. Yes. We told him that under the statute, where they had any way injured the party allegedly kidnapped,

that they would be subject to the death penalty, and I really didn't have to tell him that because Judge Hatch reminded us of it on at least three occasions, and it was written in the press where the death penalty was discussed, and the death penalty would apply in any case where there was injury to the person. Of course, with an allied charge of rape, that is certainly the most serious injury that I can think of.

Q. Did you discuss with him the possible consequences of a sentencing on a plea of guilty?

A. Yes. We told him that under the Parole Law, that we made an investigation and gave him the best we could, that we believed he would have to serve about twelve or fifteen years. I can't say for sure. It's been eight years ago. But, I know that we gave him definite information that he would have a long sentence to serve, but we didn't expect a fifty-year sentence.

Q. When you told him that he might serve twelve or fifteen years, did you tell him that this would be his [fol. 179] sentence or did you tell him that this was your judgment of what the sentence might be?

A. I just told him what the maximum under the statute might be and we would try to get mercy.

Q. And what did you tell him about the maximum?

A. We made a very strong plea for mercy, but didn't get any.

Q. What did you tell Mr. Brady the maximum sentence was?

A. Well, I believe it was fifty years. That's my best recollection. If he didn't, if he pled guilty, because I didn't take any part in the Tafoya operation by which he changed his plea. I only learned that from Mr. Espinosa verbally and through a letter from Judge Chavez, and I naturally had told him he could get the death penalty, and so I felt very gratified when he decided to change his plea in that we saved him from a death penalty in my opinion.

* * * *

[fol. 180] Q. Yes. Did you make any representation, any statement to Mr. Brady concerning what might occur after he was sentenced?

A. In the matter of pardons and things of that kind?

Q. Yes, sir.

A. No. After the boys came from the courtroom with a fifty-year sentence, I asked Mr. Espinosa and Justice Chavez if they would hold a conference with the boys and we did. We got a room allowed us by one of the bailiffs and we talked to them and at that time told them we would help them in any way we could and I did help him later with a letter at the request of Mr. Medina, Brady's stepfather.

Q. Before they were sentenced, did you have any discussion about obtaining a pardon or reduction of sentence?

A. No. This happened all very suddenly. The change of plea. In January, he was obdurate that he wanted to go before a jury and I hadn't made a sufficient investigation to feel that he didn't have some chance and I make it a policy never to try to force a fellow to take a [fol. 181] plea of guilty, and never to rush him either if there is plenty of time for suppression of evidence and other things of that nature. So, I never gave a thought to anything happening to him. He was going to be cleared by a jury up until we changed the plea.

Then, that was--let's see. We changed the plea, and it was a very short time in my opinion before we went for the sentencing. May fourth, I believe he was sentenced.

Q. Before he was sentenced, was there ever a time—

A. I don't recall ever making him any promise that we would work on a pardon. I know I did do that last time. I had not given any thought to anything but just the problems of the jury trial.

Q. Well, did you exert pressure on Mr. Brady?

A. To get him to change his plea?

Q. To get him to plead guilty?

A. No. As I say, I distinctly remember walking over to him when I had just learned the night before of the change of plea on the part of Tafoya, and anticipating that Tafoya would make a very damaging witness because of his statement, and another fact that I had to give weight to and that's in all my practice, I can't think

of any young man comparable to Tafoya in the matter of integrity. That is, he would not hold back anything, [fol. 182] and he would not lie was my experience.

MR. ADANG: I am going to object to that, Your Honor.

MR. McCARTY: I think that is relevant, Your Honor.

THE COURT: Yes. I am going to overrule the objection.

A. I had a boy there that just showed that he would tell anybody—

THE COURT: Anything that went into the determination of this man of what to tell his client, I am going to let him say it.

A. And so, I went to Brady and before I could get the words hardly out my mouth, he had also known of the Tafoya change of plea and he had been advised before as to the damaging statement, and he acquiesced and said, "Yes, I have thought it over and I have decided to change my plea."

So, he really made up his own mind before I ever discussed it, hardly.

* * * *

Q. (Mr. McCarty continuing.) You did after con- [fol. 183] ducting your investigation and making yourself aware of the facts of the case to the extent you could, and after discussing the matter with your client, you were satisfied personally that it was a proper plea at that time?

A. I don't believe I ever had a case where I had to do it. There would have been no chance before a jury and I can give some of the facts if the Court would like to know how impossible it was to take him before a jury with this case.

* * * *

CROSS EXAMINATION

BY MR. ADANG:

* * * *

[fol. 187] Q. (Mr. Adang continuing.) Mr. LaFollette, when did you first see Robert Brady in connection with this matter?

[fol. 188] A. The night that he had been arrested, I believe, or the day after.

Q. Do you recall the date of that?

A. Yes. That was January the twenty-first, I believe.

Q. He was arrested that afternoon and what happened?

A. I went down to the jail about five o'clock or four thirty.

Q. Was he the only one present when you saw him at that time?

A. Yes, and he gave me a copy of the Tafoya statement.

Q. He gave you a copy of the Tafoya statement at that time?

A. Yes, he did.

Q. Do you know how he came to have a copy of the Tafoya statement on the same day it was given?

A. Tafoya had given it to him, to the best of my recollection. He definitely had it. I have it here in my file, if you want to see it.

* * * *

[fol. 189] Q. What plea did Robert Brady want to enter at the time of that first meeting?

A. Well, all the way through he wanted to plead not guilty.

Q. All the way through up until what point?

A. Up until the day after David Chavez wrote us, wrote me that Tafoya was going to change his plea to guilty and that was about—I think that was about April the twenty-eighth or somewhere in April.

Q. Did you go see Robert Brady then?

[fol. 190] A. That's when I had the conversation in which he really beat me to the draw. I asked him—I said, "We have just learned about Tafoya."

"Oh, yes," he said, "I have been studying it over, too, and I think I want to change my plea to one of guilty."

Q. Was it your advice, then, after he said that that he should plead guilty?

A. Oh, yes. I said, "Well, I certainly believe that that's the wise thing to do," and I wrote Mr. Medina a letter at that time in which I explained all these circumstances of the evidence against him and that's why I recommended that he plead.

Q. Had you made up your mind at that time that he was guilty?

A. What?

Q. Had you made up your mind at that time that he was guilty?

A. Well, a lawyer doesn't necessarily make up his mind at any time. We never know for sure even after it is all over, but I had very good evidence against him in the file that had been furnished for my investigation that made it look very difficult for him before a jury.

I certainly had a feeling that he would be convicted beyond a shadow of a doubt.

[fol. 191] Q. Did you tell him that at any time?

A. Yes, several times.

Q. You told him that several times?

A. At least once, and I think I told him more than once.

Q. Did you tell him that if he went before a jury, he would certainly get the death penalty?

A. No. I told him, though, that we were afraid he would and therefore Judge Hatch had expressed in open court that he thought he might get the death penalty, and I think that it is enough to put a lawyer on notice.

Q. Did Judge Chavez say this either before or at the time of or after he pled guilty?

A. Oh, any conversation about the death penalty was prior to the sentencing, because that was deleted out before we pled guilty to it.

Q. When did this conversation take place with Judge Hatch?

A. Which one, now?

Q. The one when Judge Hatch said there was a possibility of the death penalty?

A. Well, he said that at the time of arraignment. If I am not mistaken, he said that—if I am not mistaken—he also admitted that at the time that we went to him and told him that we had decided to change our plea, [fol. 192] and he said, "Well, I think you are wise because there is—I would certainly recommend, submit the question of the death penalty to a jury."

Q. Then, as I understand it, you actually had a meeting in chambers with Judge Hatch?

A. And the U. S. Attorney.

Q. Before thy plea was ever changed?

A. Yes.

Q. What else took place at this meeting?

A. Well, I believe it was for the purpose of changing the plea.

Q. Who else was present besides yourself and Judge Hatch?

A. Mr. Espinosa and I and Judge Hatch and the young U. S. Attorney, if I am not mistaken.

Q. Was Judge Chavez there by any chance?

A. No, I don't believe he was. He might have been. Now, we had several conferences with the court.

Q. And then after this meeting, did you go back and tell Robert Brady that Judge Hatch thought if he went before a jury, he would get a death penalty?

A. No, but I told him, though, I thought he had a good chance of getting it and I still think that that was good advice.

Q. You never mentioned that conversation with Judge [fol. 193] Hatch?

A. Never mentioned to him what Judge Hatch had said?

Q. Yes.

A. It was in the paper, and he was present in the hearings when he mentioned it.

Q. Well, maybe I misunderstood, but I thought you

had gone into Judge Hatch's chambers and that Judge Hatch had told you that he thought Mr. Brady would get the death penalty?

A. He told counsel. I guess Brady wasn't present. When we went in and told him that we thought we would change the plea, he said, "Well, I think you are very wise, because I was certainly going to submit the death penalty to the jury," and he had told us that previously, too.

Q. And didn't you also indicate to me a little bit earlier that Judge Hatch said he thought the jury would recommend a death penalty?

A. No. He said, "It is very likely that they will get the death penalty."

Q. Now, did you report this conversation to Robert Brady?

A. Well, I certainly did.

Q. You indicated, I believe, to Mr. McCarty that you had discussed possible sentences with Robert Brady, is [fol. 194] that correct?

A. Yes, we always do.

Q. And did you ever indicate to him that he would get a sentence of from ten to fifteen years if he plead guilty?

A. No, I indicated to him that he would get between whatever the maximum—we had the statute in the file and read it to him, and we said we didn't think that he would get the whole maximum, but we knew he wouldn't get the death penalty, and that we would make an earnest plea for mercy. There were some few extenuating circumstances that we submitted to Judge Hatch.

Q. Do you recall Judge Chavez or Mr. Espisona ever telling Mr. Tafoya that he would get a sentence of from five to seven years?

A. I certainly didn't. We had no more idea about the sentence, and I am sure none of the counsel told them anything definite. We certainly didn't appraise the Hatch sentence until it was imposed.

Q. Did you ever advise Robert Brady that if he went to trial, the confession of Mr. Tafoya could not be used against him?

A. Yes. I told him that I was satisfied we could keep that out as to him.

Q. Can you recall when you told him that?

[fol. 195] A. Well, I told him that during the progress of the preparation of the case. I couldn't tell you the date, though.

Q. Did you ever advise Mr. Brady of the possibility that he could plead not guilty and waive a jury trial or go to trial without a jury?

A. I wouldn't say whether we ever thought of going to trial without a jury because I'm convinced Judge Hatch would not have tried it without a jury.

Q. Well, did Judge Hatch ever tell you that?

A. I won't say that he didn't, but I don't remember that far back. We discussed many angles with Judge Hatch and the U. S. Attorney.

Q. And is it your testimony, then, that you can't recall whether you told Brady about this?

A. I believe it is. I wouldn't say whether anything was ever said about trying it without a jury.

Q. Did you ever discuss—

A. I believe Judge Hatch at one time, though, in a conference said he would not try it without a jury.

Q. When did this conference take place?

A. Well, one of the two or three conferences that the counsel had with him. That's the recollection, but very faint. I can't be sure.

Q. Now, do I understand it that counsel had two or [fol. 196] three conferences with Judge Hatch without the defendants being present?

A. Well, I won't say whether they were present or not. Most of the conversations were with him, with them present.

Q. Do you recall if Mr. Brady was present at this conversation that you think Judge Hatch said he would not try without a jury?

A. Yes. It would have been one of the official hearings.

Q. Would that be a hearing in which a transcript was made?

A. I wouldn't say. I have no recollection of the nature of it. I just have a faint recollection of it.

* * * *

[fol. 198] Q. Mr. LaFolette, did you ever investigate the possibility that Mr. Tafoya's confession was involuntary or coerced in any way or incorrect?

A. Yes, I investigated many angles for correctness. I had very little chance to investigate outside of Mr. Tafoya himself, and he admitted making the statement [fol. 199] and never did indicate to me, although we had joint conferences with he and Brady. He never indicated to me that he had changed his story.

Q. Well, did you discuss with Mr. Tafoya or his attorneys how the confession was made?

A. No, but I know that—I believe that they indicated it was made freely and voluntarily. I believe Tafoya said, "I gave them a free and full statement."

* * * *

[fol. 201] Q. Did they ever indicate to you that they wanted their son to plead not guilty?

A. No. They certainly didn't try to interfere with the technical side of the case. I wrote the letter after he had decided to plead guilty to Mrs. Medina, fully explaining because I knew a mother would be worrying to death about her son, and I wanted her to know that we would have gladly gone to trial if it was possible, and I think the letter would speak for itself. I have a copy of it here. It gives ample reasons for pleading guilty.

* * * *

[fol. 202] Q. Was it your testimony, Mr. LaFolette, [fol. 203] that you had told Mr. Brady that with his case, he could not go before a jury?

A. I didn't feel he could with my experience as a lawyer.

Q. When you said that, what did you mean?

A. I meant that there was just so many damaging facts that we just couldn't go to a jury.

Q. Why couldn't you go to a jury?

A. Because it would be almost sure conviction and possibly a death penalty.

[fol. 211] THE COURT: Well, I am just holding that [fol. 212] the statute isn't unconstitutional for whatever way anyone wants to take it, you or the circuit court or whoever it is. I am holding that the statute is constitutional.

MR. ADANG: All right, sir. My belief is that Judge Gordon ruled on two grounds: That the court could impanel an advisory jury in any event and secondly, that a recommendation of the death penalty was not binding upon the court, and I think that point two which is briefed in our memorandum brief deals with that, and I think that the manner in which Judge Hatch interpreted the act at that time and cited it to the defendants withdrew the possibility before they pled guilty that he could impanel an advisory jury. I think it is—

THE COURT: All that a jury could have done if Judge Hatch had ruled the other way was to decide whether or not the man should have the death penalty or not and since Judge Hatch didn't impose the death penalty, why the man wasn't hurt any by Judge Hatch not calling a jury to decide whether he should be put to death or not. Since Judge Hatch took the lesser view, why, I don't think the man was hurt and has anything to complain about by Judge Hatch not calling a jury.

MR. ADANG: Well, I respectfully disagree with the Court on that. The question is whether there is a different penalty if you plead not guilty than if you plead [fol. 213] guilty. Is there a greater penalty for pleading not guilty, and the possibility exists.

THE COURT: You may make your record, but the Court's going to hold that this man pleaded guilty voluntarily, regardless of what Judge Hatch said or didn't say before; that without regard to that, this man pleaded guilty voluntarily. His lawyer has been here and testified, a man with many, many years of experience. He testified that in his opinion, why, the plea of guilty was proper and in his opinion it was voluntarily given; that

in his opinion this man made up his mind to do it by reason of the fact that the other defendant decided to plead guilty and not because of anything that he or Judge Hatch or anyone else said, and so I am going to hold that this man's plea was voluntarily given without any duress, without any threats, without any promises, or without anything.

[fol. 214] MR. ADANG: Your Honor, although the petition itself didn't raise the question, the brief in support of it did raise the issue of competency of counsel.

THE COURT: Well, the Court's going to hold that the attorneys for this man were competent attorneys. There isn't any question in my mind but what those men knew what they were doing and that they are very competent. It isn't a question of whether someone makes a mistake or doesn't make a mistake. The only question is whether they are competent counsel and the opinion of the Court is they were competent counsel.

DEFENDANT'S EXHIBIT 1

SUPREME COURT OF NEW MEXICO
SANTA FE, NEW MEXICOChief Justice
David Chavez, Jr.Lowell C. Green
Clerk

Justices

M. E. Noble
Irwin S. Moise
J. C. Compton
David W. CarmodyReceived Mar. 7, 1968,
U. S. Attorney's Office, Al Albuquerque, N. M.Filed at Albuquerque, N. M., Mar. 20, 1968,
E. E. Greeson, Clerk.

March 6, 1968

RE: Robert M. M. Brady v. United States
Civil No. 70-7269

Mr. Scott McCarty	M	Mr. Peter J. Adang
Assistant U. S. Attorney	At	Attorney at Law
P.O. Box 607	Si	Simms Building
Albuquerque, New Mexico	Al	Albuquerque, New Mexico
87103		87101

Gentlemen:

Replying to Mr. McCarty's letter of February 28, 1968,
I beg to advise as follows:

1. My name is David Chavez, Jr., and, during the pertinent period, i.e., the winter and late spring of 1959, I was engaged in the practice of law with offices in Santa Fe, New Mexico.

About the middle of February or early in May 1959, I was retained by the father of Alfonso P. Tafoya in Criminal Cause No. 19,847,847, United States District Court for the District of New Mexico. The father

of Alfonso Tafoya is Daniel Tafoya, or Dan Tafoya as we call him, and he is my nephew. Dan Tafoya spoke to me and asked if I would represent Alfonso and I advised him that I would.

2. To the best of my recollection, all of my conversations were with Alfonso P. Tafoya and his father. I did not represent Robert M. Brady and, in fact, knew that he was represented by Robert H. LaFolette and possibly Gilbert Espinosa. As far as I can recall, I did not have any conversations with Brady, or with Brady and Tafoya together. I might also add that I had no reason for talking to Brady. * * *
3. No statements were made by me to Brady or to anyone else as to reduction of sentence or as to executive clemency, if a plea of guilty was entered. As far as I know, being properly represented by counsel, Brady entered a plea of guilty. Tafoya also entered a plea of guilty. I can only speak for myself and not for anyone else connected with the case.

Very truly yours,

/s/ David Chavez, Jr.

DC:ms

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civil No. 7269

ROBERT M. BRADY, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

RESPONDENT'S PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW—Filed March 25, 1968

Comes now the United States of America by John Quinn, United States Attorney for the District of New Mexico, and Scott McCarty, Assistant United States Attorney for said District, and moves the Court to make the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

I.

The plea of guilty entered in Criminal Cause No. 19,847, United States v. Brady, United States District Court for the District of New Mexico, was freely and voluntarily made.

II.

Counsel for the Petitioner did not exert pressure upon the applicant for him to plead guilty in that said cause.

III.

No representations were made by counsel that would have the effect of rendering the plea of the Petitioner less than fully voluntary.

IV.

No representations were made by anyone which created in the mind of the defendant any belief that a promise had been made prior to his entry of a plea of guilty

that action would be taken on his behalf upon his being sentenced to reduce the sentence he might receive or to obtain executive clemency in any manner.

CONCLUSIONS OF LAW

I.

The statute under which Petitioner was prosecuted in Criminal Cause No. 19,847, United States v. Brady, United States District Court for the District of New Mexico, is constitutional.

II.

The sentence in that said cause is not subject to vacation or collateral attack.

UNITED STATES OF AMERICA
JOHN QUINN
United States Attorney

/s/ Scott McCarty
Assistant U. S. Attorney

THIS WILL CERTIFY that a true copy of the foregoing pleading was mailed to opposing counsel of record this 25th day of March, 1968.

/s/ Scott McCarty
Assistant U. S. Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 7269

ROBERT M. BRADY, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW
OF PETITIONER, ROBERT M. BRADY—Filed March, 25, 1968

Comes Now the Petitioner, ROBERT M. BRADY, and moves the Court to make the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

I.

Robert M. Brady, hereinafter called the "Petitioner", pled guilty to a charge of violating 18 U.S.C. § 1201 on April 30, 1959, and was thereafter sentenced to a term of fifty (50) years imprisonment by the Hon. Carl A. Hatch, United States District Judge for the District of New Mexico.

II.

After his arrest for violation of 18 U.S.C. § 1201, on or about January 21, 1959, the Petitioner retained Robert H. LaFollette, Esq., as his attorney. The Petitioner did not retain any other attorney nor was any other attorney retained with his consent to represent him.

III.

Alphonso Pedro Tafoya, the Petitioner's co-defendant, was arrested for violation of 18 U.S.C. § 1201 on or about the same date as the Petitioner. Alphonso Pedro Tafoya signed an alleged confession on that date, which confession was of questionable validity in view of the

circumstances surrounding its taking: to wit, that Alphonso Pedro Tafoya was purported to be an alcoholic; that the alleged confession was typewritten by a police officer; and, that the co-defendant was unable to read the statement before signing it.

IV.

Alphonso Pedro Tafoya retained, or had retained on his behalf, Gilberto Espinosa, Esq., and David Chavez, Esq., as his attorneys.

V.

Both the Petitioner and the co-defendant, Tafoya, pled not guilty to the charge of violation of 18 U.S.C. § 1201 at their arraignment.

VI.

After arrest the Petitioner was incarcerated in the Albuquerque City Jail for a period of approximately two (2) weeks. The co-defendant, Tafoya, was also in the City Jail. Both defendants discussed the case and intended to maintain their plea of not guilty and to defend the case. During this period of time, the Petitioner was unaware that the co-defendant, Tafoya, had signed a confession.

VII.

While he was in City Jail, the Petitioner talked on one or more occasions with his attorney, Mr. LaFollette. At such times, both Mr. Espinosa and the co-defendant, Tafoya, were present. The Petitioner persisted in his plea of not guilty on each such occasion.

VIII.

After approximately two weeks, the Petitioner and the co-defendant, Tafoya, were transferred by the authorities to the Santa Fe County Jail. The Petitioner remained in the Santa Fe County Jail for approximately one and one-half months. While in the Santa Fe County Jail, the Petitioner and the co-defendant, Tafoya, dis-

cussed the case and both intended to maintain their pleas of not guilty. During this period of time, the Petitioner remained unaware that the co-defendant, Tafoya, had signed a confession.

IX.

While he was in the Santa Fe County Jail, the Petitioner conferred with his attorney, Robert H. LaFollette, on only one occasion. At that time, Gilberto Espinosa was present. At this meeting, the Petitioner and his attorney discussed the defense of the case. No mention was made of a possible change of plea.

X.

After approximately one month in the Santa Fe County Jail, the Petitioner wrote a letter to the Court requesting a transfer back to Bernalillo County on the ground that his attorney would not make the trip to Santa Fe to consult with him. Shortly thereafter, the Petitioner was transferred back to the Albuquerque City Jail. The co-defendant, Tafoya, remained in the Santa Fe County Jail, however.

XI.

After the Petitioner was removed to the Albuquerque City Jail, the co-defendant, Tafoya, was visited by one of his attorneys, Dr. David Chavez, formerly a United States District Judge and now Chief Judge of the Supreme Court of New Mexico. The co-defendant is a blood relation of David Chavez and was a blood relation of the then United States Senator Dennis Chavez, now deceased.

XII.

At this meeting, Mr. Chavez discussed with the co-defendant, Tafoya, the merits of his case. He prevailed upon the co-defendant, Tafoya, to change his plea to guilty. It was represented to the co-defendant, Tafoya, that he would receive a sentence of from five (5) to seven (7) years and that the Chavez family would work to get him a pardon or clemency after he went to prison.

XIII.

The Petitioner did not see his attorney again until on or about April 21, 1959. At the meeting, the Petitioner, Robert H. LaFollette, Gilberto Espinosa, David Chavez and the co-defendant, Tafoya, were present.

XIV.

At the meeting of April 21, 1959, Robert H. LaFollette, Gilberto Espinosa and David Chavez all attempted to convince the Petitioner to plead guilty. The Petitioner was shown, for the first time, the confession of the co-defendant, Tafoya. He was told by the attorneys present that he had no defense to the charge under 18 U.S.C. § 1201.

XV.

The Petitioner requested information as to the possible penalties involved. He was told that if he continued to plead not guilty, it was very likely that a jury would recommend the death penalty. He was told by one or more of the attorneys present that if both defendants pled guilty, the co-defendant, Tafoya, would receive a sentence of from five (5) to seven (7) years and the Petitioner would receive a sentence of double that amount. The attorneys for the co-defendant, Tafoya, again stated that his family would work to get him a pardon or executive clemency. Mr. Espinosa, an attorney for the co-defendant, Tafoya, told the Petitioner that the Chavez family would do the same for him.

XVI.

Under the pressure of the advice of his attorney and the attorneys for the co-defendant, Tafoya, and the representation of Tafoya's attorney that the Chavez family would aid him, the Petitioner reluctantly consented to change his plea to guilty. At that time, he believed himself to be innocent, however.

XVII.

After the meeting of April 21, 1959, the three attorneys involved met with the Hon. Carl A. Hatch in chambers to discuss a possible change of plea for both defendants. At that meeting, Judge Hatch stated to counsel that it was his opinion that if the defendants went before a jury, they would probably get the death penalty. This comment was conveyed to the Petitioner by his attorney prior to the time he changed his plea to guilty.

XVIII.

On April 30, 1959, the Petitioner and the co-defendant, Tafoya, formally changed their pleas to guilty. At that time, the Petitioner believed himself to be not guilty. When the Court asked him if there were any agreements or understandings, he replied in the negative because his attorney told him that if he did not give that answer the Court would not accept his plea of guilty.

XIX.

After the plea of guilty was entered, the Petitioner was interviewed by a United States Probation Officer. The information conveyed to said officer apparently caused the latter to believe that the guilty plea of the Petitioner was not voluntary and the information in the pre-sentence report of the United States Probation Office caused the Court, on May 8, 1959, to question the Petitioner with respect to the voluntariness of his plea of guilty.

XX.

The Petitioner still believes that he is innocent of the charge under 18 U.S.C. § 1201.

XXI.

At no time did the Petitioner's attorney advise him that the confession of the co-defendant, Tafoya, could not be used against him at a trial.

XXII.

At no time did the Petitioner's attorney conduct an investigation into the voluntariness of the co-defendant, Tafoya's, alleged confession.

XXIII.

At no time did the Petitioner's attorney advise the Petitioner of, or conduct an inquiry into the possibility of the Petitioner pleading not guilty and trying his case to the Court without a jury.

XXIV.

The Petitioner's attorney allowed him to plead guilty with the knowledge that the Petitioner believed himself to be innocent and was only pleading guilty because he feared the death penalty and understood that, if he pled guilty along with the co-defendant, Tafoya, he would either be pardoned or receive clemency through the efforts of the Chavez family.

XXV.

The Petitioner's attorney conducted all conferences with the Petitioner in the presence of either the co-defendant, Tafoya, or his attorneys, or both, knowing that the interests of the co-defendant, Tafoya, were possibly adverse to those of the Petitioner.

XXVI.

The Petitioner entered a plea of guilty on April 30, 1959, to the charge under 18 U.S.C. § 1201 only because of pressure from his attorney, representations that a politically influential family would work to get him a pardon or clemency and fear of the death penalty.

XXVII.

The Petitioner did receive executive clemency after being sent to prison. As a consequence, his sentence was reduced to thirty (30) years. This clemency was obtained without any effort on the part of the Petitioner.

XXVIII.

Prior to the entry of a plea of guilty by the Petitioner, the Court stated that, if he pled guilty, it would not empanel an advisory jury to consider the question of the death penalty.

XXIX.

Prior to the entry of a plea of guilty by the Petitioner, the Court represented that, if a jury recommended the death penalty after a trial, such a recommendation would be binding upon the Court.

CONCLUSIONS OF LAW

I.

The Court has jurisdiction of the parties and the subject matter.

II.

The Court is empowered to inquire into the voluntariness of the plea of guilty of the Petitioner to a charge under 18 U.S.C. § 1201.

III.

The plea of guilty of the Petitioner entered on April 30, 1959, was not voluntary for the following reasons:

(a) The Petitioner was improperly advised of his rights by his attorney in that he was not told that the confession of his co-defendant, Tafoya, could not be used against him and he was not advised of the possibility that he could plead not guilty and try his case to the Court with a jury;

(b) The Petitioner understood, and pled guilty on the basis of this understanding, that if he pled guilty, a politically powerful and influential family in New Mexico would work to get him a pardon or executive clemency;

(c) The Petitioner feared the possibility of the death penalty, particularly in light of the statement by Judge Hatch that if he pled not guilty, the jury would most likely recommend the death penalty; and

(d) The attorneys involved, Robert H. LaFollette, Gilberto Espinosa and David Chavez, along with Judge Hatch, all made a predetermination of the Petitioner's guilt and their comments and advice were calculated and designed to, and did, coerce the Petitioner into a plea of guilty.

IV.

18 U.S.C. § 1201 (a) is unconstitutional for the reason that it coerces a guilty plea and thereby induces an accused to forego his right to a trial by jury, which right is guaranteed by the Sixth Amendment to the Constitution.

V.

If 18 U.S.C. § 1201 (a) is not unconstitutional, Judge Carl A. Hatch interpreted and applied the statute in such a way as to coerce the Petitioner into pleading guilty and foregoing his right to a trial by jury.

VI.

The judgment and sentence against the Petitioner should be vacated and the Petitioner should be allowed to enter a plea of not guilty to the charge against him.

/s/ Peter J. Adang
Attorney for Petitioner
P. O. Box 2168—1200 Simms Bldg.
Albuquerque, New Mexico

I HEREBY CERTIFY that I have delivered a copy of the foregoing to all counsel of record, this 25th day of March, 1968.

/s/ Peter J. Adang

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 7269 Civil

[File Endorsement (Omitted in Printing)]

ROBERT M. BRADY, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

MEMORANDUM DECISION AND ORDER—March 27, 1968

This shall constitute the findings of fact and conclusions of law of the Court.

This was a proceeding brought under Section 2255 of Title 28 of the United States Code, wherein Robert M. Brady brought a petition against the United States of America requesting that his plea of guilty be set aside and that his sentence be revoked. He claims two grounds for this. He first contends that Section 1201(a) of Title 18 of the United States Code is unconstitutional. Secondly, he claims that he was coerced in some way in making his plea of guilty. In this connection, he alleges that Judge Hatch, who conducted the proceeding, failed to live up to Rule 11 of the Federal Rules of Criminal Procedure, and he claims that his attorney, Robert Hoath LaFollette, Jr., was either incompetent or that he did not properly represent him in this proceeding. The Court hereby rules against him on all points, and has denied, and does hereby deny, any relief under Section 2255 of Title 28 of said Code.

The Court will first discuss the question of the constitutionality of the statute. The petitioner places his reliance upon *Jackson v. U.S.*, 262 Fed. Supp. 716. A copy of the Decision and Order of Judge Timbers is attached to the petitioner's pleadings. That case has been appealed by the United States and, it is the understanding of this Court, that the same is before the Supreme Court of the United States at this time. An illuminating case

concerning this statute is *Robinson v. United States*, 264 Fed. Supp. 146, decided by Judge Gordon in the Western District of Kentucky. The Robinson case is not exactly like our case, but in any event, Judge Gordon respectfully disagreed with Judge Timbers concerning the constitutionality of the statute. It is true that Judge Gordon took the position that if a jury recommended the death penalty, that such was advisory and that the Court could refuse to follow the recommendations of the jury by doing various things mentioned in the opinion.

It does not appear to me that the statute is unconstitutional, and I so hold. It has been before the courts on many occasions, although the precise point raised here has probably not been raised except in the Timbers case. However, this Court respectfully differs with Judge Timbers about this matter.

The question has been raised that the petitioner was coerced into pleading guilty because he was afraid to ask for a jury trial and take the chances on getting a death sentence. Some question has been raised about the acts of Judge Hatch in this regard. After hearing the evidence, the Court was of the opinion, and now finds, that the petitioner decided to plead guilty when he learned that his co-defendant was going to plead guilty, and that his determination had nothing to do whatsoever with anything that Judge Hatch said or with what his attorneys might have said. The Court finds that the petitioner knew all about the confession given by his co-defendant. The Court further finds that Mr. LaFollette thoroughly explained to the petitioner that the written confession could not be used against the petitioner. However, after Tafoya pled guilty, he could have testified against the petitioner and that fact was fully known by the petitioner when he changed his plea. The Court further finds that the plea of guilty was made by the petitioner by reason of other matters and not by reason of the statute nor by reason of any acts of conduct of Judge Hatch. It is the conclusion of the Court that the statute is constitutional and that the proceedings before Judge Hatch are constitutional.

The Court finds the facts against the petitioner. The Court finds that Judge David Chavez represented the defendant Tafoya and that Mr. Gilberto Espinosa helped him. It is true that Mr. Espinosa made a plea in behalf of Brady, as well as Tafoya, before Judge Hatch, and that he helped Mr. LaFollette, at the request of Mr. LaFollette, in this final appearance. However, Mr. LaFollette was the only paid attorney that the petitioner had. The Court finds that Mr. LaFollette made a trip to El Paso, Texas, and investigated the case very fully. The Court further finds that he made investigations in this area, including a review of what the Government witnesses might testify to. The Court finds that Mr. LaFollette also made a considerable investigation of the law pertaining to the case and that he represented the petitioner in a very efficient manner. The Court finds that Mr. LaFollette told the petitioner all of the facts and circumstances surrounding the case, including the pertinent law, and that the petitioner decided, on his own volition, to plead guilty. It is true that Mr. LaFollette had decided, on his own investigation, that it was best for the petitioner to plead guilty, but that the petitioner had already decided the same thing before he talked to Mr. LaFollette.

The Court further finds the petitioner knew that Tafoya was going to plead guilty before he consulted with his attorney in this regard. The Court does not believe that the petitioner first learned of the Tafoya statement shortly before he pled guilty. The Court finds that he was told about it when he was first interviewed by Mr. LaFollette. The Court further finds that any comments of Judge Hatch were not relayed to the petitioner before he decided to change his plea to guilty. The Court further finds that no pressures were put upon the petitioner by his attorney, or anyone else, to plead guilty to the charge, but that he pled guilty freely and voluntarily.

The petitioner further contends that he pled guilty because his co-defendant Tafoya was kin to Senator Chavez and Judge Chavez and that representations had been made to him that if he would plead guilty, that he would receive clemency. He further contends that he

was assured that he would receive a prison sentence of between ten to fifteen years, if he would plead guilty. The Court finds against the petitioner on these contentions and finds that no representations were made to him. It is clear from reading the entire record that Judge Hatch had never made any such representations and the Court finds that the lawyers made no such representations. The lawyers did express their opinions concerning the length of sentence to the best of their judgment. In other words, the attorneys told the petitioner that they would do what they could for him, but that the petitioner knew that such were only the recommendations of the lawyers and not promises of any kind.

With regard to the claim of clemency, the Court finds that no promises were made at any time. The Court further finds that the guilty plea was entered without any promise, representation, or coercion whatsoever.

The Court concludes that the statute in question is constitutional and that the plea was voluntarily and knowingly made. The Court concludes that no representations, threats, promises, or coercion of any kind was communicated to the petitioner and that his plea was knowingly and voluntarily made. The Court further concludes that the petitioner was represented by competent counsel who had had many years of experience in criminal law, and that a full and adequate investigation had been made by such counsel before the entry of the plea.

The Court concludes that the petitioner has not shown any grounds for any relief in this proceeding and that the proceeding should be, and it is hereby dismissed, with prejudice.

All of the requested findings of fact and conclusions of law which are contrary, or opposed to those contained above, are hereby denied.

Dated at Albuquerque this 27th day of March, 1968.

/s/ H. Vearle Payne
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civil No. 7269

[File Endorsement (Omitted in Printing)]

ROBERT M. BRADY, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

ORDER—Filed March 27, 1968

This matter having come on for hearing on motion of the Petitioner, Robert M. Brady, to vacate sentence and collaterally attack judgment pursuant to Title 28, Section 2255, U. S. Code as Annotated, and the Court having heard testimony and received evidence and having heard argument of counsel and being otherwise fully advised in the premises, it is, therefore,

ORDERED that the petition be and the same hereby is denied.

/s/ H. Vearle Payne
United States District Judge

APPROVED AS TO FORM:

/s/ Peter J. Adang
PETER J. ADANG
Attorney for Petitioner

/s/ Scott McCarty
Assistant U. S. Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civil No. 7269

[File Endorsement (Omitted in Printing)]

ROBERT M. BRADY, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

NOTICE OF APPEAL—Filed April 11, 1968

Notice is hereby given that the Petitioner, ROBERT M. BRADY, hereby appeals to the United States Court of Appeals for the Tenth Circuit from the Order entered herein on March 27, 1968, denying his Petition under Title 28, U. S. C. Section 2255.

/s/ Peter J. Adang
Attorney at Law
P. O. Box 2168—1200 Simms Bldg.
Albuquerque, New Mexico
Attorney for Petitioner

I HEREBY CERTIFY that I have mailed a copy of the foregoing to all counsel of record, this 10th day of April, 1968.

/s/ Peter J. Adang

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civil No. 7269

ROBERT M. BRADY, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

MOTION—Filed April 29, 1968

Petitioner, ROBERT M. BRADY, by his attorney, hereby moves the Court for an Order granting him leave to proceed with his appeal in *Forma Pauperis* and without pre-payment of fees, costs and security therefor, and in support of said Motion, attaches hereto as exhibit "A", his *Affidavit*.

/s/ Peter J. Adang

I HEREBY CERTIFY that I have mailed a copy of the foregoing to all counsel of record, this 29th day of April, 1968.

/s/ Peter J. Adang

EXHIBIT "A"

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF NEW MEXICO

Civil No. 7269

Filed at Albuquerque, Apr. 29, 1968,
E. E. Greeson, Clerk.

ROBERT M. BRADY, PETITIONER

v8.

UNITED STATES OF AMERICA, RESPONDENT

AFFIDAVIT

STATE OF KANSAS)
)
) SS.
COUNTY OF LEAVENWORTH)

ROBERT M. BRADY, being first duly sworn, upon his oath, deposes and states that:

1. Because of his poverty, he is unable to pay the fees and costs of appealing the Order of the Court entered herein, or to give security for such fees and costs.
2. He believes that he is entitled to redress and a reversal of the aforesaid Order of the Court.
3. The issues which he intends to present on said appeal are those which were presented in his Petition under Title 28, U. S. C. Section 2255, all of which were denied by the Court.

/s/ Robert M. Brady
ROBERT M. BRADYSubscribed and sworn to before
me this 16 day of April, 1968.

/s/ Perry R. MacPhee
Notary Public.
My Commission Expires: _____
Parole Officer

"Authorized by the Act of July 7, 1955
to administer oaths (18 U.S.C. 4004)."

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civil No. 7269

[File Endorsement (Omitted in Printing)]

ROBERT M. BRADY, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

ORDER—April 29, 1968

This matter having come on for hearing on the Motion by the Petitioner, ROBERT M. BRADY, for leave to prosecute his appeal from the Order of the Court entered herein on March 27, 1968, in *Forma Pauperis*, the Court being fully advised in the premises, and having found that the Petitioner is unable to pay the fees and costs of appeal or to give security therefor, and further finding that the appeal is taken in good faith and is not taken frivolously, it is, therefore,

ORDERED, ADJUDGED AND DECREED that the Petitioner, Robert M. Brady, hereby is granted leave to prosecute his appeal in *Forma Pauperis*, and the Court Reporter is hereby directed to prepare an original and one copy of all the proceedings in this cause, including but not limited to all proceedings had at the hearing, to be prepared at the expense of the judiciary appropriation, administered by the Administrator of the United States Courts.

/s/ H. Vearle Payne
Judge, United States District Court

IN THE UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 10110—NOVEMBER TERM, 1968

[File Endorsement Omitted]

ROBERT M. BRADY, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of New Mexico

(District Court No. 7269)

PETER J. ADANG for Appellant.

JOHN A. BABINGTON, Assistant United States Attorney
(John Quinn, United States Attorney, was with him
on the brief) for Appellee.

Before JONES *, BREITENSTEIN and HOLLOWAY, Circuit
Judges.

BREITENSTEIN, Circuit Judge.

OPINION—Filed December 17, 1968

Appellant seeks § 2255 relief from a 50-year sentence imposed on his guilty plea to a violation of the Federal Kidnapping Act. 18 U.S.C. § 1201. The district court held an evidentiary hearing and denied relief.

In *United States v. Jackson*, 390 U.S. 570, the Court held that the death penalty provision of the Federal Kid-

* Of the Fifth Circuit, sitting by designation.

naping Act imposed an impermissible burden on the exercise of a constitutional right but that such provision is separable and does not destroy the remainder of the Act. The Court recognized that the presence of the proscribed provision did not imply that every guilty plea was involuntary. *Id.* at 583.

Voluntariness is a question of fact and all matters which bear thereon must be considered. See *McFarland v. United States*, D.C.Md., 284 F.Supp. 969, 977. The appellant and one Tafoya were charged jointly. Appellant was represented by attorney LaFollette who was retained almost immediately after appellant's arrest. Tafoya was represented by retained attorneys Espinosa and Chavez. At the § 2255 hearing, appellant, his codefendant Tafoya, LaFollette, and Espinosa testified. On agreement of counsel a letter from Chavez, then Chief Justice of the Supreme Court of New Mexico, was received in evidence. The testimony of the lawyers and of their clients was in sharp conflict. The trial court chose to believe the lawyers and said:

"The Court further finds that the plea of guilty was made by the petitioner by reason of other matters and not by reason of the statute nor by reason of any acts or conduct of Judge Hatch [the sentencing judge]."

The other matters included appellant's knowledge at the time LaFollette was retained of Tafoya's confession, LaFollette's report to appellant of his investigation including a review of prospective testimony of government witnesses, knowledge that Tafoya would plead guilty, and LaFollette's advice on legal issues including the inadmissibility of Tafoya's confession and the possibility that Tafoya would testify against appellant. The finding of the trial court that the guilty plea was not made because of the statute but because of other matters is supported by substantial evidence and is binding on us. We are convinced that the appellant voluntarily pleaded guilty.

The other points raised deserve little consideration. The findings dispose of the claims of promises regarding sentence and executive clemency. The findings and the

evidence amply show competence of counsel. The exclusion of the mother's testimony of her conversation with Tafoya's mother was proper under the hearsay rule. Neither the presentence report nor the subsequent grant of executive clemency had anything to do with the voluntariness of the plea.

Affirmed.

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Before Judges WARREN L. JONES, JEAN S. BREITENSTEIN
and WILLIAM J. HOLLOWAY, JR., Circuit Judges.

10,110

ROBERT M. BRADY, APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of New Mexico

JUDGMENT—December 17, 1968

This cause came on to be heard and was argued by counsel. On consideration whereof it is ordered that the judgment of the said district court in this cause be and the same is hereby affirmed.

WILLIAM L. WHITTAKER
Clerk

By /s/ Helen R. Bartha
Deputy Clerk

On January 23, 1969, the mandate of the United States Court of Appeals for the Tenth Circuit, in accordance with the opinion and judgment of said court, was issued to the United States District Court for the District of New Mexico.

* * * *

SUPREME COURT OF THE UNITED STATES

No. 1925 Misc., October Term, 1968

ROBERT M. BRADY, PETITIONER

v.

UNITED STATES

On petition for writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN
FORMA PAUPERIS AND GRANTING PETITION FOR
WRIT OF CERTIORARI—June 23, 1969

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 1558, placed on the summary calendar and set for oral argument immediately following No. 1064.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.